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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VAN WEELDE BROTHERS SHIPPING LIMITED, and JOONG ANG SHIPPING CO., LTD.,

Petitioners,

vs.

I.N.C.A.S. and MONTEREY PRINTING AND PACKAGING, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: April 3, 1985

Appellate Printing Co., Inc. (201) 753-0200

QUESTIONS PRESENTED

1. Whether a district court has the discretion, either pursuant to Supplemental Rule E(7) or its inherent powers of equity, to make whatever orders are appropriate with respect to the posting of counter-security on the part of a plaintiff in an admiralty *in rem* action?

2. Whether, in the absence of such discretion, the exercise of Supplemental Rule C in this case unconstitutionally violates the Due Process Clause?

PARTIES BELOW

Petitioners Van Weelde Brothers Shipping Limited and Joong Ang Shipping Co., Ltd. ("Joong Ang"), defendants—appellees in the court below, are foreign corporations with no places of business in the United States.

Respondents I.N.C.A.S. and Monterey Printing and Packaging, Ltd., plaintiffs—appellant in the court below, are also foreign corporations with no places of business in the United States.

Joong Ang appears on behalf of the M/V SANG JIN, defendant—appellee in the court below, pursuant to supplemental rule E(8).

Defendant Grundvig Chartering, Inc., a New York corporation, made no appearance in either the district court or court of appeals below.

TABLE OF CONTENTS

Questions Presented i

Parties Below i

Table of Contents and Index to Appendix ii

Table of Authorities iii

Opinion Below 2

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 5

REASONS FOR GRANTING THE WRIT:

I: The Decision Below Raises Significant Questions as to the Constitutionality of Supplemental Rule C 11

II: The Decision Below Conflicts with the Decisions of this Court, the Decisions of the Court of Appeals Below and the Decisions of Other Courts of Appeals as to the Proper Interpretation of Rule E(7) and to the Ordering of Counter-Security 14

Conclusion 23

Certificate of Service 24

INDEX TO APPENDIX

Opinion and Judgment of Court 1a

Order Denying Rehearing 18a

Order of District Court (September 13, 1983) 20a

Order of District Court (September 13, 1983) 23a

Order of District Court (September 24, 1982) 24a

TABLE OF AUTHORITIES

CASES CITED:

British Transport Com. v. United States,
354 U.S. 129, 77 S.Ct. 1103, 1 L.Ed.2d 1234
(1957) 20

Cardinal Shipping Corp. v. M/S SEISHO MARU,
744 F.2d 461 (5th Cir. 1984) 20

Empresa Maritima a Vapor v. North & South
American Steam Nav. Co.,
16 F. 502 (S.D.N.Y. 1883) 12, 18

Fuentes v. Shevin,
407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556
(1972) 11

Hartford Acc. & Indemn. Co. v. Southern
Pacific Co.,
273 U.S. 207, 47 S.Ct. 357, 71 L.Ed. 612
(1927) 20

Merchants Nat. Bank v. Dredge GEN. G.L.
GILLESPIE,
663 F.2d 1338, 1982 A.M.C. 1
(5th Cir. 1981), cert. dismissed 456
U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865
(1982) ..... Passim

Mitchell v. W.T. Grant Co.,
416 U.S. 600, 94 S.Ct. 1985, 40 L.Ed.2d 406
(1974) 11

Moore v. New York Cotton Exchange,
270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750
(1926) 21

North Georgia Finishing Inc. v. Di-Chem, Inc.,
419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751
(1975) 11, 12

Plant v. Blazer Financial Services, Inc. of Ga.,
598 F.2d 1357 (5th Cir. 1979) 21

Schiffahrtsgesellschaft Leonhardt & Co. v.
A. Bottacchi,
732 F.2d 1543, 1984 A.M.C. 2113 (11th Cir.
1984), petition for rehearing en banc
granted __ F.2d __ (11th Cir. 1984) 14-15, 19

Sniadach v. Family Finance Corp.,
395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349
(1969) 11

Swift & Co. Packers v. Compagnia Colombiana
Del Caribe, S.A.,
339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206
(1950) 18

Techem Chem. Co. v. M/T CHOYO MARU,
416 F.Supp. 960, 1976 A.M.C. 1954
(D.Md. 1976) 15, 19

TTT Stevedores of Texas, Inc. v.
M/V JAGAT VIJETA,
696 F.2d 1135 (5th Cir. 1983) 21

United States v. Reliable Transfer Co.,
421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251,
1975 A.M.C. 541 (1975) 19

Vaughan v. Atkinson,
369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88,
1962 A.M.C. 1131 (1962) 18

Washington-Southern Nav. Co. v. Baltimore &
P.S.B. Co.,
263 U.S. 629, 44 S.Ct. 224, 68 L.Ed. 480
(1924) 14, 15, 17

STATUTES CITED:

28 U.S.C. § 1254 (l) 2

28 U.S.C. § 1333 5

RULES CITED:

Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims

Rule B 11, 14, 19

Rule C ..... Passim

Rule E(2)(b) 13

Rule E(5) 3

Rule E(7) ..... Passim

Rule E(8) 1

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Borri, "Maritime Attachment and Arrest: Facing a Jurisdictional and Procedural Due Process Attack," 35 Wash. & Lee L. Rev. 153 (1978) . 13

Culp, Charting a New Course: Proposed Amendments, 103 F.R.D. 319 (1984) 19

McCreary, "Going for the Jugular Vein: Arrests and Attachments in Admiralty," 28 Ohio St. L.J. 19 (1967) 13

Schwartz, "Due Process and Traditional Admiralty Arrest and Attachment Under the Supplemental Rules," 8 Mar. Law. 229 (1983) 12-13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners Van Weelde Brothers Shipping, Limited and Joong Ang Shipping Co., Ltd. (on behalf of the M/V SANG JIN pursuant to Supplemental Rule E(8)) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 3, 1984.

OPINION BELOW

The opinion of the Court of Appeals, reported at 747 F.2d 958, appears in the Appendix hereto. No formal opinion was rendered by the United States District Court for the Southern District of Texas. The order of the District Court from which the appeal was taken appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 3, 1984. A timely petition for rehearing *en banc* was denied on January 4, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Supplemental Rules for Certain Admiralty and Maritime Claims,

> Rule C Actions In Rem: Special Provisions (1) When Available. An action in rem may be brought:
>
> (a) To enforce any maritime lien;
>
> (b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.
>
> Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be

allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

Rule E(7)

Security on Counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

STATEMENT OF THE CASE

This action, within the admiralty and maritime jurisdiction of the District Court, 28 U.S.C. § 1333, arises from the judicial arrest, pursuant to Supplemental Rule C, of the M/V SANG JIN on September 2, 1982 in Galveston, Texas. This arrest was caused by respondents INCAS and Monterey Printing & Packaging, Ltd., foreign corporations, without places of business in the United States, organized under the laws of Somalia and Zambia, respectively (hereafter referred to collectively as "INCAS"). Petitioner Van Weelde Brothers Shipping, Ltd. ("Van Weelde") is a Dutch corporation and the charterer of the M/V SANG JIN. Petitioner Joong Ang Shipping Co., Ltd. ("Joong Ang") is a foreign corporation and owner of the M/V SANG JIN. On September 10, 1982 the District Court ordered that the vessel be released upon the posting of security in the amount of $1,600,000.00 and that INCAS post security in the amount of $125,000.00 to secure petitioner Van Weelde Brothers Shipping, Ltd.'s ("Van Weelde") possessory lien on certain cargo then being stored in Florida. Thereafter, as an accommodation, both cargo and vessel were released by the posting of $1,475,000.00.[1]

On September 17, 1982, Van Weelde moved for the posting of counter-security by INCAS pursuant to Supplemental Rule E(7). On September 24, 1982 the District Court, exercising its discretion, ordered the posting of counter-security by INCAS in the amount of $1,475,000.00 as security on Van Weelde's counterclaim (App. at 25a).

While plaintiffs offered to provide "security" for the counterclaim in the form of letters of undertaking from

1. The posting of this security consisted of a P&I Club letter of undertaking in the amount of $1,100,000.00 and a deposit in the amount of $375,000.00 in the registry of the District Court.

the Central Bank of Somalia and the Standard Bank of Zambia, these letters of undertaking called for collection of the undertaking only in either Somalia or Zambia in Somali shillings and Zambian kwatchas, respectively. INCAS admitted that it is illegal to transfer local currency out of those African countries. In other words, if and when the time to collect on such an undertaking arose, Van Weelde would be left with $1,475,000.00 worth of Somalian shillings and Zambian kwatchas that must be spent only in Somalia and Zambia. This was unacceptable and was not approved as counter-security by the District Court (App. at 23a).

The discovery which was taken prior to the entry of the order appealed from revealed the position of INCAS and Monterey on counter-security to be a sham. In support of its application to post counter-security in the form of a letter of undertaking from the Central Bank of Somalia, INCAS provided the affidavit of its president, Adan Abdi Hussein, which simply stated that INCAS "is not in a position to deposit bond or cash."

On April 7 and 8, 1982, the deposition of Mohamed Warsame Elmi, the general director of Incas, was taken in Houston, Texas concerning this matter. When questioned about the above-quoted affidavit, Mr. Elmi stated:

> Q. It's your understanding that all this paper says is that Incas has no money outside Somalia?
>
> A. Yes.
>
> Q. It doesn't say that Incas doesn't have money?
>
> A. Yes.
>
> Q. And it doesn't say that Incas can't get money out of Somalia?
>
> A. Doesn't say.

It should be pointed out that 75% of INCAS is owned by an entity known as Interbanana (which is owned by the Government of Somalia), 15% by another agency of the Government of Somalia, and 10% by an Italian individual named Luciano Guedotti. In addition, the entity which insured the cargo in question is also owned by the Government of Somalia. No proofs were offered which would indicate that these shareholders were unable to aid in the posting of security.

Further, despite initial protestations from the Bank of Somalia, INCAS was able to send approximately $264,000.00 from Somalia to the United States to pay the freight for the cargo from Florida to Somalia. Mr. Elmi testified:

> Before we ask the bank to pay the freight of LEONHARDT previously, to pay before the ship is supposed to be rented, *the bank told us that they didn't have the money* and the bank asked us if it was possible for us to pay when the ship was supposed to arrive in Somalia, after the ship would have been arrived in Somalia. We ask, we asked this of our lawyers and our lawyers couldn't find the ship that was available for the payment in Somalia. We asked our bank that it wasn't possible to find a ship available, a ship that could have, would have received money after delivering in Somalia. *Then we asked our bank that to pay for this freight, how would they suggest a way of payment, and they said that within 15 days of departure of the ship, they could have paid that amount.*

(Emphasis added.) In short, the Bank of Somalia was able to release funds when it was to Somalia's or INCAS' advantage (keeping in mind INCAS is nearly wholly owned by the Government of Somalia) but not when it was to its disadvantage. Indeed, no real attempt to ob-

tain the funds from the Bank of Somalia for the posting of counter-security was ever made. As Mr. Elim testified:

> Q. What did the bank tell you when you wanted the money for the freight on the HEIDE LEONHARDT? Didn't they tell you they didn't have the money?
>
> A. Yes, but they said that they could have paid it within 15 days.
>
> . . .
>
> Q. Has the bank indicated [with regard to counter-security] to you when it might have the money?
>
> A. No.
>
> Q. *How many times have you asked the bank for the money?*
>
> A. *One time.*
>
> . . .
>
> Q. *As I understand it, you have not asked the bank for money to fulfill the Court's order in 1983?*
>
> A. *No, I didn't ask.*

(Emphasis added.)

The submissions by Monterey concerning its alleged inability to post security were similar to the position taken by INCAS. Monterey contended that the Government of Zambia generally prohibits "externalization" of Zambian funds (*i.e.*, the removal of Zambian currency from Zambia) but it is clear that the Government permits externalization when it is to its advantage. Again, as with INCAS, Monterey did not exactly make heroic efforts to obtain counter-security. Indeed, the only proposal made concerning counter-security would leave Van Weelde totally insecure: the bond given would be paid in

kwachas, the payment would be made in Zambia and could only be spent in Zambia. This was part of Monterey's ploy to avoid posting anything of value. Michael Purslow, the managing director of Monterey, was questioned at his deposition concerning a letter he had sent to the Standard Bank of Zambia "requesting" their aid in posting counter-security:

> Q. Let me read to you the section of the letter I am talking about. Says: "Our lawyers have suggested that if we agreed to post the security in our own countries in local currency, such an action, while possibly being unacceptable to the defendants, could prove acceptable to the judge and give us the necessary time to complete our own legal claims and retain the holding from of the defendants".
>
> A. That's true.

Indeed, Mr. Purslow's testimony clearly indicates that Monterey's position regarding counter-security is a ploy and that the fiction of Zambia restricting the externalization of Zambian funds was totally irrelevant to the issues before the District Court. Moveover, Mr. Purslow testified that the shareholders of Monterey are Modern Packaging International (a British concern), St. Regis Paper (which holds 40% of the shares) and two Zimbabwe entities. Mr. Purslow testified, and there is no doubt, that St. Regis "is an enormous combine" and, of course, is located in the United States.

Thus, the statements of the Court of Appeals that INCAS and Monterey have "made an attempt to post counter-security" and have "at least indicated a prospective inability to meet the court's demand" (11a) make a mockery of the actual factual record.

The game Monterey and Incas are playing is obvious. Indeed, it is difficult to believe their allegations of

financial hardship when plaintiffs had four attorneys present for depositions in this matter, two from Mobile, Alabama, one from Houston, Texas, and one from London, England. With the various resources available to plaintiffs, it is clear that the alleged difficulties in externalizing funds from the African nations in which they reside is a ploy and a sham, choreographed in the hopes that they would be permitted to utilize the United States Courts to further their scheme.

Plaintiffs never sought a reduction of the amount of counter-security. Their failure to comply with the District Court's order lasted nearly one year. They simply ignored the District Court's order.

Several weeks after INCAS was ordered to post counter-security, the petitioners moved for sanctions due to INCAS' failure to comply with the District Court order. On September 13, 1983, nearly one year after the entry of the order requiring INCAS to post counter-security, the District Court entered an order requiring INCAS to post counter-security in the amount of $1,475,000.00 within ten days upon pain of the release of the security posted for the release of the M/V SANG JIN.

On September 20, 1983, INCAS filed a notice of appeal from the order of September 13, 1983. On December 3, 1984 the Court of Appeals rendered judgment vacating the order requiring INCAS to post counter-security and remanded the cause for further proceedings.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises Significant Questions as to the Constitutionality of Supplemental Rule C

Since this Court's line of decisions concerning the constitutionality of state attachment and provisional remedies statutes—*Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975)—the constitutionality of Supplemental Rules B and C has also been brought under close scrutiny. While these rules have been upheld, in the Second,[2] Fourth,[3] Fifth,[4] Ninth,[5] and Eleventh[6] Circuits, the rationale for upholding these rules includes, in no small part, the availability of Rule E(7) counter-security and the broad equitable powers of an admiralty court to enter an appropriate order beyond the powers enumerated by the Supplemental Rules.

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2. *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 1979 A.M.C. 1829 (2d Cir. 1979).

3. *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 1981 A.M.C. 2697 (4th Cir. 1981).

4. *Merchants Nat. Bank v. Dredge GEN. G.L. GILLESPIE*, 663 F.2d 1338, 1982 A.M.C. 1 (5th Cir. 1981), cert. dismissed 456 U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865 (1982).

5. *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 1982 A.M.C. 2330 (9th Cir. 1982).

6. *Schiffahrtsgesellschaft, Leonhardt & Co. v. A. Bottacchi*, 732 F.2d 1543, 1984 A.M.C. 2113 (11th Cir. 1984), petition for rehearing en banc granted ___ F.2d ___ (11th Cir. 1984).

The decision of the court below has resurrected the serious constitutional question thought to be resolved in *Merchants*, *supra* at n.4, by unduly restricting the application of Rule E(7) and the discretion of a district court to render "whatever orders are appropriate" with respect to counter-security. 663 F.2d at 1346. The deprivation of the right to obtain counter-security raises an even graver question than its effect on petitioners herein: why should a foreign corporation, with no tangible assets, be permitted to invoke the jurisdiction and *in rem* processes of our Courts, obtain full security for its claim, and yet be unanswerable to the vessel interests for even so much as an award of costs should the claim fail? Looking back to the century-old decision of Judge Addison Brown concerning the need for counter-security in such a situation:

> Where the security obtained by the libelant in the suit *in rem* is the vessel itself under seizure, which in this case is of great value, and *where the libelant is a foreign corporation, having no tangible property here, the reasons for the application of the rule are specially urgent.*

Empresa Maritima a Vapor v. North & South American Steam Nav. Co., 16 F. 502, 504 (S.D.N.Y. 1883) (emphasis added).

It is this very purpose which gave life to the statements in *Merchants*, *supra* n.4, that a district court has the inherent power to enter "whatever orders are appropriate with respect to . . . the posting of security on the part of the plaintiff." 663 F.2d at 1346. Similarly, in the *North Georgia* case, Justice Powell stated in his concurring opinion that in his view, "procedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security . . . ." 419 U.S. at 611; 42 L.Ed.2d at

760.[7] See also Schwartz, "Due Process and Traditional Admiralty Arrest and Attachment Under the Supplemental Rules," 8 Mar. Law. 229, 258, 267 (1983) wherein Judge Schwartz recommends an amendment to Supplemental Rule E(2)(b) so as "to authorize the court to require plaintiff to give security in an amount sufficient to protect the defendant for all costs, expenses, *as well as damages* which could reasonably be expected to result from a wrongful seizure" (emphasis of Judge Schwartz); Borri, "Maritime Attachment and Arrest: Facing a Jurisdictional and Procedural Due Process Attack," 35 Wash. & Lee L. Rev. 153, 170 (1978) (". . . the Supplemental Rules should require that a plaintiff post bond before the issuance of the writ or warrant to insure the defendant compensation against wrongful seizure"); McCreary, "Going for the Jugular Vein: Arrests and Attachments in Admiralty," 28 Ohio St. L.J. 19, 39-41 (1967).

If it is accepted that the traditional admiralty *in rem* and *quasi in rem* procedures comport with procedural due process because of the various remedies available to the defendants, as most courts of appeals have so determined, then the courts must give more than lip-service to the basic protections afforded to defendants in such actions by Rule E(7) and the inherent powers of an admiralty court to insure that the initiating suitor provides security for the defendant's counterclaim should

---

7. Justice Powell elaborated as follows:

> The basic protection required for the debtor is the assurance of a prompt postgarnishment hearing before a judge. Such a hearing affords an opportunity to rectify any error in the initial decision to issue the garnishment. *When combined with the availability of the garnishor's bond to compensate for any harm caused*, the possibility of prompt correction of possible error suffices to satisfy the requirements of procedural due process in this context.

Id. at 611 n.3; 42 L.Ed.2d at 760 n.3 (emphasis added).

the seizure prove to be wrongful. In short, the district courts must be given the authority,[8] in appropriate cases, to require the party who has obtained the seizure of a vessel to post security to answer a wrongful seizure claim asserted by those having an interest in the vessel. In short, the courts must make certain that the parties are placed "on an equality as regards security." *Washington-Southern Nav. Co. v. Baltimore & P.S.B. Co.*, 263 U.S. 629, 639, 44 S.Ct. 224, 68 L.Ed. 480,-485 (1924) (Brandeis, J.).

By eradicating the Rule E(7) check against the easily-invocable judicial arrest of a vessel, the Court of Appeals below has brought the constitutionality of Rules B and C once again into question. A writ of certiorari should issue to the Court of Appeals so that the confusion created by the conflict in the decisions of the various courts of appeals, which have upheld Rules B and C, and the decision below, may be cured by this Court, and, particularly in view of the pending amendments to the Supplemental Rules, to be effective August 1, 1985 to remove any question about the constitutionality of these Rules, and the efficacy of the pending amendments.

II

The Decision Below Conflicts with the Decisions of this Court, the Decisions of the Court of Appeals Below and the Decisions of Other Courts of Appeals as to the Proper Interpretation of Rule E(7) and to the Ordering of Counter-Security

Rule E(7) permits a district court to require a plaintiff, who has obtained security on his *in rem* or *quasi in rem* claim, to post counter-security to answer a counter-

8. What Judge Brown's decision giveth in *Merchants*, *supra*, 663 F.2d at 1346 (district courts have the inherent equitable authority to enter "whatever orders would be appropriate with respect to . . . the posting of security on the part of the plaintiff . . ."). Judge Brown's decision below taketh away.

claim "arising out of the same transaction or occurrence with respect to which the action was originally filed." Further, a number of Courts of Appeals, including the Fifth Circuit, have acknowledged, most notably in actions involving the constitutionality of Rules B and C, the inherent equitable authority of a district court to enter "whatever orders would be appropriate with respect to . . . the posting of security on the part of the plaintiff." *Merchants Nat. Bank v. Dredge GEN. G.L. GILLESPIE*, 663 F.2d 1338, 1346, 1351, 1982 A.M.C. 1, 12-13, 20 (5th Cir. 1981), *cert. dismissed* 456 U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865 (1982); *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi*, 732 F.2d 1543, 1984 A.M.C. 2113 (11th Cir. 1984), petition for rehearing *en banc* granted __ F.2d __ (11th Cir. 1984); see also *Techem Chem. Co. v. M/T CHOYO MARU*, 416 F.Supp. 960, 970-72, 1976 A.M.C. 1954, 1969-72 (D.Md. 1976).

This Court, although not having addressed or construed the counter-security rule in over 60 years, has determined that the intent of the rule is "to place the parties on an equality as regards security." *Washington-Southern Nav. Co. v. Baltimore & P.S.B. Co.*, 263 U.S. 629, 639, 44 S.Ct. 224, 68 L.Ed. 480, 485 (1924).

Here, the foreign corporations, which initiated the suit by arresting the M/V SANG JIN, were able to obtain full security on their claims through the posting of a letter of undertaking (in the amount of $1,100,000.00) and cash (in the amount of $375,000.00) by using the Rule C processes of the district court. No party to this action had any contact with the Southern District of Texas. Thus, plaintiffs were able, by the filing of a complaint, to invoke the subject matter jurisdiction of the district court and to obtain full security on their claims solely through the legal fiction that the *alleged* maritime lienor has an *interest* in the vessel. At the same time, the foreign plaintiffs sought to avoid the posting of any se-

curity to answer the merits of the counterclaim.[9] Indeed, it seems clear that these plaintiffs will be unable to answer an even award of taxed costs in favor of Van Weelde should that ultimately come to pass.

The district court, under those circumstances, exercised its discretion to "enter whatever order would be appropriate with respect to . . . the posting of security on the part of the initiating suitor," *Merchants*, *supra*, 663 F.2d at 1346, as well as under Rule E(7), so as to put the adverse parties on an equal footing with respect to security. The Court of Appeals vacated that order. Noteworthy is that the Court of Appeals did not reverse for abuse of discretion, but held that a counterclaim for, *inter alia*, wrongful seizure, can *never* form the basis for the posting of counter-security. 747 F.2d at 965 (App. at 16a). By so ruling, the Court of Appeals has opened the doors of the district courts to any and all foreigners and has encouraged the commencing of frivolous claims on dubious maritime liens by depriving vessel owners or charterers of the right (inadequate as it was) to demand and obtain counter-security on a counterclaim based on the wrongful seizure, or detention, of property. The invitation to irresponsible entities is clear: if you have a questionable lien, seek to enforce it in the United States, for there will be no redress for those you injure in the United States courts.

By so emasculating the discretion lodged in the district court by Rule E(7) and extinguishing the equitable powers of an admiralty court to enter whatever order may be appropriate with respect to the posting of counter-security, the Court of Appeals' decision topples the delicate balance needed to secure the fair and proper administration, and indeed, the constitutionality of the

9. The efforts of plaintiffs in seeking to post counter-security cannot be said to have been conducted in good faith. *See* Statement of the Case, *supra* at 6-10.

fictional *in rem* admiralty procedures. *See* Point I, *supra*. Turning first to the fact the decision of the Court of Appeals violates the intent of Rule E(7), we note, specifically that:

> 1. The Court of Appeals' decision runs counter to this Court's doctrine of equality in the posting of security as espoused in *Washington-Southern*, *supra*;
>
> 2. The Court of Appeals' decision inexplicably extinguishes the authority of a district court to enter appropriate counter-security orders;
>
> 3. The Court of Appeals' decision emasculates Rule E(7) by holding that only compulsory counterclaims can trigger the posting of counter-security under Rule E(7) and that a claim for wrongful seizure does not so qualify.

A. *The Doctrine of Equality*

Mr. Justice Brandeis stated 60 years ago that the propriety of an order compelling the posting of counter-security was "to place the parties on an equality as regards security." *Washington-Southern Nav. Co. v. Baltimore & P.S.B. Co.*, 263 U.S. 629, 639, 44 S.Ct. 224, 68 L.Ed. 480, 485 (1924). In so holding the Court relied greatly on the now century-old decision of Judge Addison Brown:

> The object of Rule 53, I cannot doubt, was that, in cases of cross-demands upon the same subject of litigation, *both parties should stand upon equal terms as regards security*. It was designed, where the libelants in a suit *in rem*, through the arrest of the property, exact and obtain security for their own demand, that in a cross-suit *in personam* for a counterclaim in respect to the same subject of litigation, defendants in the former suit should likewise

> be entitled to security for the payment of their demands, in case the decision of the court upon the point in controversy should be in their favor. *The rule was designed to correct the inequality and injustice of the process of court in rem being used to obtain security in favor of one party, in reference to a single subject of dispute, while it was denied to the other.*

Empresa Maritima a Vapor v. North & South American Steam Nav. Co., 16 F. 502, 504 (S.D.N.Y. 1883) (emphasis added). Thus, the Court of Appeals' jaundiced view of the counterclaim and overly restrictive view of the availability of Rule E(7) counter-security run against the intent of the rule, as enunciated by the Supreme Court in 1924, that is, to correct "the inequality and injustices" of a plaintiff having obtained security whereas a counterclaimant, with respect to the same transaction or occurrence, may remain completely insecure.

B. *The Equitable Power Of An Admiralty Court*

As this Court has stated, "[e]quity is no stranger to admiralty; admiralty courts are indeed authorized to grant equitable relief." *Vaughan v. Atkinson*, 369 U.S. 527, 530, 82 S.Ct. 997, 999, 8 L.Ed.2d 88, 91, 1962 A.M.C. 1131, 1133 (1962); *see also Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 692, 70 S.Ct. 861, 94 L.Ed. 1206, 1212 (1950), wherein Justice Frankfurter, speaking for the Court, found no restriction upon admiralty "so unrelenting as to bar the grant of *any* equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction" (emphasis added).

Recognizing this, the Fifth Circuit has held that

> . . . federal courts have inherent powers in admiralty. *United States v. Reliable Transfer Co., Inc.*,

> 421 U.S. 397, 409, 95 S.Ct. 1708, 1715, 44 L.Ed.2d 251, 261, 1975 A.M.C. 541, 550. An Admiralty Court thus possesses a particular and sufficient capacity to enter whatever order would be appropriate with respect to the release of a vessel under seizure or the posting of security on the part of the initiating suitor.

Merchants, supra, 663 F.2d at 1346. *Accord, Schiffahrtsgesellschaft, supra*, 732 F.2d at 1548; *Techem Chemical Co., Ltd. v. M/T CHOYO MARU*, 416 F.Supp. 960, 970, 1976 A.M.C. 1954, 1969 (D.Md. 1976) ("An admiralty court . . . may in an appropriate case grant equitable relief which is not limited by the provisions of Rules E(6) and E(7)"); Culp, *Charting a New Course: Proposed Amendments*, 103 F.R.D. 319, 334 n. 75 (1984).

Despite having determined the power of an admiralty court to enter an order concerning the posting of counter-security and the release of the subject vessel in earlier actions, the Court of Appeals below inexplicably ignored this broad-based authority by determining that the district court possessed no authority either to require the posting of security by these plaintiffs or to release the security posted as a sanction.

The failure of the Court of Appeals to abide accordingly conflicts not only with its own eloquent discussion of the equitable powers of an admiralty court in *Merchants*, but also this Court's traditional recognition of the role of the Judiciary "in formulating flexible and fair remedies in the law maritime," *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409, 95 S.Ct. 1708, 1715, 44 L.Ed.2d 251, 261, 1975 A.M.C. 541, 550 (1975). This shortcoming in the result reached by the Court of Appeals is of no small moment since, as can be seen in Point I, *supra*, this broad equitable power is the heart and soul of the conclusion reached by some Circuits, including the

Fifth, that Rules B and C do not violate the Due Process Clause.

C. *The Authority Granted By Rule E(7)*

The Court of Appeals held only a compulsory counterclaim can trigger Rule E(7). This interpretation not only runs counter to Rule E(7) itself but also the proper construction of the compulsory counterclaim rule.

Federal procedural policy supports the pragmatic notion that all parties and all claims should be joined in a single action as often as practicable. This is no less true in an admiralty setting:

> Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the fore-runner in eliminating from other federal practices.

British Transport Com. v. United States, 354 U.S. 129, 139, 77 S.Ct. 1103, 1 L.Ed.2d 1234, 1241 (1957). Admiralty practice is, of all things, not as limited as determined by the Court of Appeals below. Rather, its essence is that it "looks to a complete and just disposition of a many cornered controversy." *Hartford Acc. & Indemn. Co. v. Southern Pacific Co.*, 273 U.S. 207, 216, 47 S.Ct. 357, 71 L.Ed. 612 (1927).

In this light, the Court of Appeals' determination that Van Weelde's counterclaim is not "compulsory" and that Rule E(7) concerns only compulsory counterclaims is perplexing, particularly with regard to the Court of Appeals' prior broad approach to the powers of an admiralty court.[10]

10. The Court of Appeals' comparison of Van Weelde's counterclaim for wrongful seizure to a claim for malicious prosecution was also inappropriate. *See, e.g, Cardinal Shipping Corp. v. M/S SEISHO MARU*, 744 F.2d 461, 475 (5th Cir. 1984)(Rubin, J., concurring) ("[i]t is time to reconsider whether wrongful seizure, even if provoked in good faith, should not entail liability. . . .").

Whether a counterclaim is "compulsory" turns on whether it arises out of the same transaction as the complaint. This Court has determined that the term "transaction" is a word of "flexible meaning," which "may comprehend a series of many occurrences, depending *not so much upon the immediateness of their connection as upon their logical relationship.*" *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610, 46 S.Ct. 367, 70 L.Ed. 750, 757 (1926) (emphasis added). Following the tenor of *Moore*, it has nearly universal acceptance that an affirmative answer to any of the following four questions indicates the counterclaim is compulsory:

1. Are the issues of fact and law raised by the claim and counterclaim largely the same?

2. Would *res judicata* bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?

3. Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?

4. Is there any logical relation between the claim and the counterclaim?

See, e.g., Plant v. Blazer Financial Services, Inc. of Ga., 598 F.2d 1357, 1360 (5th Cir. 1979).

In its counterclaim, Van Weelde alleges, *inter alia*, the wrongful seizure of the M/V SANG JIN by virtue of the filing of the complaint and concomitant invocation of Rule C. That there is a "logical relation" between the claims is obvious; that the same evidence will either support or refute the complaint and the counterclaim was conceded by all parties. *See also*, Judge Brown's opinion in *TTT Stevedores of Texas, Inc. v. M/V JAGAT VIJETA*, 696 F.2d 1135, 1141 (5th Cir. 1983) ("Because

we have held that TTT Stevedores had a good lien, we find Dempo entitled to no damages for wrongful seizure").

We suggest that the blanket rule adopted by the Court of Appeals below that a wrongful seizure counterclaim can never trigger the posting of counter-security gives rise to significant questions as to the administration of actions commenced under Rule C. A writ of certiorari is sought so that the inconsistencies between the holding below and the traditional definition of a compulsory counterclaim may be resolved by this Court.

CONCLUSION

For these reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Dated: April 3, 1985

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VAN WEELDE BROTHERS SHIPPING LIMITED, and JOONG ANG SHIPPING CO., LTD.,

Petitioners,

vs.

I.N.C.A.S. and MONTEREY PRINTING AND PACKAGING, LTD.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 1985, three copies of the Petition for Writ of Certiorari were mailed, air mail postage prepaid, to the following counsel for respondents:

VINSON & ELKINS
First City Tower
1001 Fannin
Houston, Texas 77002

JOHNSON, ADAMS, MAY, HOWARD & HILL
Merchants National Bank Bldg. Annex
Mobile, Alabama 36633

I further certify that all parties required to be served have been served.

/s/ Clarkson S. Fisher, Jr.

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APPENDIX

INCAS AND MONTEREY PRINTING AND PACKAGING, LTD.,
Plaintiffs-Appellants,

v.

M/V SANG JIN, her engines, tackle, apparel, etc., in rem, Joong Ang Shipping Co., Van Weelde Brothers Shipping Ltd. and Grundvig Chartering, Inc.,
Defendants-Appellees.

In re INCAS AND MONTEREY PRINTING AND PACKAGING LTD., Petitioners.

Nos. 83-2571, 83-2627.

United States Court of Appeals,
Fifth Circuit

Dec. 3, 1984.

An order of the United States District Court for the Southern District of Texas at Houston, Ross N. Sterling, J., in an admiralty case required plaintiffs to post countersecurity under a supplemental admiralty rule, on pain of loss of its security for its original claim. Plaintiffs appealed, and petitioned for writ of mandamus. The Court of Appeals, Brown, Circuit Judge, held that: (1) there is some flexibility built into final judgment rule, and practical, not technical, considerations are to govern principles of finality, and the order appealed from was appealable, and (2) whether or not an action for wrongful seizure, abuse of process or malicious prosecution may be asserted as counterclaim in admiralty practice, countersecurity under admiralty rule may not be required for such a claim.

Vacated and remanded.

1. Admiralty—Key 103

Where plaintiffs invoked district court's in rem jurisdiction by seizing defendants' vessel, and where plaintiffs released vessel in exchange for security posted by vessel interests, plaintiffs' in rem lien was transferred from vessel to fund representing security, and since cancellation of security would in effect put end to plaintiff's complaint in rem, destroying jurisdiction of court and thus rendering moot any appeal therefrom, order requiring plaintiffs to furnish security for defendants' counterclaims or suffer sanction of release of defendant's security for plaintiffs' claims was final and appealable and in any event, whether or not final, was appealable under *Cohen* doctrine. Supplemental Admiralty and Maritime Claims Rules C, E(7), 28 U.S.C.A.; Fed.Rules Civ. Proc.Rule 9(h), 28 U.S.C.A.; 28 U.S.C.A. §§ 1291, 1292(b).

2. Federal Courts—Key 572

To be appealable under *Cohen* doctrine, order must conclusively determine disputed question, resolve important issue completely separate from merits of action and be effectively unreviewable on appeal from final judgment.

3. Federal Courts—Key 584

There is some flexibility built into final judgment rule, and practical, not technical, considerations are to govern principles of finality.

4. Federal Courts—Key 666

Requirement of rule that notice of appeal designate judgment from which it is taken is not to be so strictly construed as to defeat an appeal where overriding intent to appeal is clear, and fact that plaintiffs' notice of appeal referred only to sanctions section of order was not

fatal to jurisdiction of the Court of Appeals. Supplemental Admiralty and Maritime Claims Rule E(7), 28 U.S.C.A.; F.R.A.P.Rules 3(c), 4(a)(1), 28 U.S.C.A.; 28 U.S.C.A. § 2106.

5. Admiralty—Key 59

Admiralty is not concerned with common-law labels as to theories of recovery, or causes of action, and Court of Appeals was entitled to treat claim broadly as a claim for wrongful seizure, whether denominated as such or as one for abuse of process, malicious prosecution or all three.

6. Admiralty—Key 58

Language of admiralty rule under which counter-security may be required when counterclaim is asserted which arises out of the same transaction or occurrence as original libel is identical to that defining compulsory counterclaims under federal rule of civil procedure, and thus court can draw guidance on the proper scope of the admiralty rule by examining the test for counterclaims under the federal rule of civil procedure. Supplemental Admiralty and Maritime Claims Rule E(7), 28 U.S.C.A.; Fed. Rules Civ.Proc.Rule 13(a), 28 U.S.C.A.

7. Admiralty—Key 58
Federal Civil Procedure—Keys 776, 777

Under broad test adopted, counterclaim is compulsory when there is any logical relationship between claim and counterclaim, but even under such liberal standards, action in nature of wrongful seizure or malicious prosecution does not lie as compulsory counterclaim under federal rule of civil procedure, and admiralty rule governing countersecurity and containing language identical to the federal rule of civil procedure will not be applied to broader class of counterclaims than that permitted under the federal rule of civil procedure. Supplemental

Admiralty and Maritime Claims Rule E(7), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 13(a), 28 U.S.C.A.

8. **Admiralty—Key 58**

Whether or not an action for wrongful seizure, abuse or process or malicious prosecution may be asserted as counterclaim in admiralty practice, counter-security under admiralty rule may not be required for such a claim. Supplemental Admiralty and Maritime Claims Rule E(7), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 13(a), 28 U.S.C.A.

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Royston, Rayzor, Vickery & Williams, Bradley A. Jackson, Houston, Tex., for—M/V Sang Jin.

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Bradley A. Jackson, Howard R. King, Edward J. Murphy, Kathy A. Morrow, Houston, Tex., George J. Koelzer, Red Bank, N.J., Clarkson S. Fisher, Jr., Red Bank, N.J., for Joong Ang Shipping et al.

Appeal from the United States District Court for the Southern District of Texas.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas.

Before BROWN, GEE, and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This is an appeal from an order of the district court in an admiralty case requiring plaintiffs to post counter-security under Supplemental Admiralty Rule E(7), on pain of loss of its security for its original claim, which would likely destroy the *in rem* jurisdiction of the district court. We review the claims, vacate the district court order, and remand.

In the Beginning

The controversy[1] spawning this legal action began in 1982, when plaintiffs arranged for the carriage of two consignments of paper aboard the M/V SANG JIN.[2] Although the vessel was to proceed to East Africa, it instead made an unexpected stop in Pensacola, Florida, where plaintiffs' cargo was discharged. Plaintiffs demanded possession of their cargo from defendants, Van Weelde Bros., the time charterers, and Joong Ang Shipping, the owners of the vessel. Defendants, however, refused delivery, claiming a lien on the cargo for the expense of discharging it in Florida.[3]

Plaintiffs, seeking recovery of their cargo and damages for breach of contract of carriage, filed a complaint and had the M/V SANG JIN judicially arrested in Galveston on September 3, 1982 pursuant to Supplemental Admiralty Rule C.[4] One week later, the district court entered

1. We recite the facts as alleged in plaintiffs' complaint.
2. One consignment was taken on board in Savannah, Georgia, and the other in St. John, New Brunswick.
3. Although the vessel sailed without issuing bills of lading, a third defendant, Grundvig Chartering, Inc., subsequently issued bills of lading as subcharterer. Defendant Van Weelde alleges that these bills of lading were fraudulently issued. Grundvig Chartering, named as a defendant in plaintiffs' complaint, has yet to appear in this action.
4. In its complaint, Incas invoked F.R.Civ.P. 9(h) to obtain the benefit of the Supplemental Rules for Admiralty.

an order requiring that security of $1,600,000 be posted for release of the vessel, and that plaintiffs post security of $125,000 for release of their cargo, in light of defendants' lien for discharge expenses.

On September 17, 1982, defendant Van Weelde filed its answer to plaintiffs' complaint, including counterclaims seeking $2,960,000 in damages. Van Weelde, the time charterer, alleged that plaintiffs had wrongfully seized the M/V SANG JIN with resultant commercial losses, including loss to its business reputation.[5] On the same day, Van Weelde moved that plaintiffs be required to post counter-security for these counterclaims, as provided for in Supplemental Admiralty Rule E(7).[6]

On September 24, 1982, the parties reached an agreement whereby plaintiffs' cargo in Pensacola would be released without the posting of the $125,000 security required by the court's order, on condition that plaintiffs agree to accept security for the vessel for $125,000 less than the $1,600,000 previously ordered by the court, and with plaintiffs' agreement not to use the release of the cargo as an additional defense to Van Weelde's lien against the cargo. On the same day, the court ordered that, defendants having posted security of $1,475,000 in the form of $375,000 deposited in the court registry and a letter of undertaking from the vessel owner's Protection and Indemnity Club in the amount of $1,100,000, plaintiffs would be required to post equivalent counter-security for defendants' counterclaims.

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5. Defendant Joong Ang, who filed a Claim as Owner of the M/V SANG JIN, has made no counterclaims.

6. Supplemental Admiralty Rule E(7) provides as follows:
(7) Security on counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to re-

Plaintiffs having failed to post counter-security, defendants moved on October 4, 1982 that the court impose sanctions in the form of a release of the security posted by the vessel interests. Plaintiffs responded by requesting the court to reconsider its order requiring counter-security, a request which was denied by the court on March 16, 1983.[7]

On September 13, 1983,[8] the district court repeated its order of September 24, 1982 that plaintiffs post counter-security in the amount of $1,475,000. The court also ordered that the security posted by the vessel interests be released if counter-security was not posted within 10 days. On September 20, 1983, plaintiffs filed notice of appeal of the September 13, 1983 order. On September 22, 1983, this court granted a stay of the district court's order, pending "further orders of the court." Plaintiffs thereafter sought alternate relief from the district court's order in the form of a petition for writ of mandamus. Ultimately, this court ordered the petition for writ of mandamus carried with the case pending determination of the appealability of the district court order of September 13, 1983.

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spond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. . . .

Thus, a counterclaim arising "out of the same transaction or occurrence" as the original claim is a prerequisite to the posting of counter-security under Rule E(7).

7. Plaintiffs moved the court to amend its denial of reconsideration to permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On September 13, 1983, the court denied plaintiffs' motion to so certify the order.

8. The parties were not idle in the intervening months. During this time period, the court considered numerous discovery motions, as well as repeated motions by defendants to require plaintiffs to post security.

Appealability

[1, 2] Defendants first challenge the appealability of the September 13, 1983 order as lacking finality under 28 U.S.C. § 1291 (1982). That order required plaintiffs to furnish security for defendants' counterclaims within 10 days, or else suffer the sanction of the release of defendants' security for plaintiffs' claims.[9] We find the court's order final, and hence appealable under § 1291; we further find that, even if not final, the order is nevertheless appealable under the *Cohen* doctrine.

Plaintiffs have invoked the trial court's *in rem* jurisdiction by seizure of defendants' vessel. Upon release of the vessel in exchange for the security posted by the vessel interests, plaintiffs' *in rem* lien was transferred from the vessel to the fund representing the security. G. Gilmore and C. Black, *The Law of Admiralty*, § 9-89 (2d ed. 1975). Thus, cancellation of the security would in effect put an end to plaintiffs' complaint *in rem*, destroying the jurisdiction of the court and thus rendering moot any appeal therefrom. *Seaboard and Caribbean Transport Corp. v. Hafen-Dampfschiffahrt A.G.*, 329 F.2d 538, 1964 A.M.C. 2109 (5th Cir.1964). *See also L.B. Harvey Marine, Inc. v. M/V "RIVER ARC,"* 712 F.2d 458, 459, 1984 A.M.C. 1588 (11th Cir.1983) (in maritime action, where *res* is no longer before the court, *in rem* jurisdiction destroyed); *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362, 1983 A.M.C. 2968 (11th Cir.1982) (same

9. The pertinent part of the court's order is as follows:
It is, therefore,
ORDERED that plaintiffs will post security into the registry of the court in conformity with the court's September 24, 1982, order within 10 days of the date of this Order. It is further ORDERED that upon plaintiffs failure to comply with the terms of this Order, Defendants motion for sanctions is GRANTED and the order of the court requiring defendants to post security is VACATED.

holding), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983).[10]

In *Seaboard*, we held that a decree in an *in rem* admiralty action releasing the bond put an end to the libel, and hence was a final decision and immediately appealable. 329 F.2d at 540, 1964 A.M.C. at 2112. Similarly, in *U.S. v. Vertol H21C, Registration No. N8540*, 545 F.2d 648 (9th Cir.1976), an order releasing the certificate of deposit securing an *in rem* action against a helicopter was held appealable under 28 U.S.C. § 1291, primarily because "release of the helicopter (and the substituted security) ended the *in rem* action." *Id.* at 650. Thus, where a court order vacates the attachment securing an *in rem* action, the order is final for purposes of § 1291.

Defendants further contend, however, that the order is not final because it merely reflected the court's *intention* to enter sanctions if plaintiffs failed to post counter-security. It is true that the security posted by defendants has not yet been released due to an order of this court staying release of the security. But even if *in rem* jurisdiction has not yet been destroyed, the district court's order is still appealable under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Cohen created a narrow exception to the final judgment rule, permitting appeals of orders which finally determine rights separable from the merits of the action, and which are too important to be denied review. *Id.* at 546, 69 S.Ct. at 1225–26, 93 L.Ed. at 1536. In order to be appealable under the *Cohen* doctrine, an order must (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the

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10. For a full discussion of the effect of the substitution of security for a vessel's release, *see* the opinion of Woolsey, J., in *J.K. Welding Co. v. Gotham Marine Corp.*, 47 F.2d 332, 1931 A.M.C. 407 (S.D.N.Y.1931).

merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351, 357–58 (1978) (footnote omitted); *Oasis Oil and Refining Corp. v. Armada Transport and Refining*, 719 F.2d 124, 126 (5th Cir.1983).

We believe such compelling considerations are shown by the record in the case before us. The Supreme Court has recognized that an order vacating an attachment has *Cohen*-type finality. *Swift & Company Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206 (1950). As the court there recognized, appellate review at a later date of an order releasing security "would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible." 339 U.S. at 689, 70 S.Ct. at 865, 94 L.Ed. at 1210.

[3] As previously discussed, entry of the order releasing the security for plaintiffs' claim would destroy the trial court's *in rem* jurisdiction. And even though that security has not yet in fact been released, we must remember that there is some flexibility built into the final judgment rule, and that practical, not technical considerations are to govern the principles of finality. *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1226, 93 L.Ed. at 1536; *Oswalt v. Scripto*, 616 F.2d 191, 194 (5th Cir. 1980). For all practical purposes, the only remaining step necessary to end the present action is for the court formally to order the actual release of the security posted by the vessel interests, as it has specifically said it would do if counter-security is not posted.[11] We can imagine no more

11. Defendants cite our decision in *Constructora Subacuatica Diavaz, S.A. v. M/V HIRYU*, 718 F.2d 690 (5th Cir.1983) for the proposition that an order prospectively vacating a writ of attachment is not final within the meaning of § 1291. In that case, however, the court observed that bond for the release of the arrested vessel had yet to be fixed, nor did the record afford any basis for

perfect example of an over-technical application of the final judgment rule than to dismiss plaintiffs' appeal merely for want of one more order affecting the release of the security posted by defendants.[12]

We therefore find the order in question appealable under 28 U.S.C. § 1291.[13] Given the nature of the court's order, and its practical effect on plaintiffs' claim, we believe that appellate review at this point is not only appropriate, but is necessary if the order is to be reviewable at all.[14]

Finally, the Merits

[4] This brings us to plaintiffs' contention that Van Weelde's counterclaims are not the type for which

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determining whether, when the bond was eventually fixed, it would be impossible as a practical matter for those required to post security to produce it. In the instant case, however, counter-security has already been required in the amount of $1,475,000. Moreover, unlike the situation in *Constructora*, libellants here have made an attempt to post counter-security, and have at least indicated a prospective inability to meet the court's demand. Thus, we believe this case is drawn closer to *Swift & Co.*, than to *Constructora*.

12. We are, of course, cognizant of our duty to strictly construe the collateral order doctrine. *See, e.g. Anchor Hocking v. Willamette Indus., Inc.*, 694 F.2d 1041 (5th Cir.1983); *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir.1980), *cert. denied sub nom, Mead Corp. v. Adams Extract Co.*, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980); *North American Acceptance Corp. v. Arnall, Golden and Gregory*, 593 F.2d 642 (5th Cir.1979), *cert. denied sub nom, Arnall, Golden and Gregory v. Smith, Cohen, et al.*, 444 U.S. 956, 100 S.Ct. 436, 62 L.Ed.2d 328 (1979).

13. Our decision that the order is appealable under this section renders unnecessary any determination whether, as plaintiffs assert, it is appealable under 28 U.S.C. § 1292(a)(3), providing for appeal of certain orders in admiralty cases. We also need not consider plaintiffs' petition for writ of mandamus to decide this question.

14. In *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), the Supreme Court stressed that even if an order meets all the other criteria for the *Cohen* doctrine, it

counter-security may be required under Admiralty Rule E(7).[15]

[5] Defendant Van Weelde's counterclaim asserts that plaintiffs (1) wrongfully seized the SANG JIN, (2) requested grossly excessive security, resulting in (3) interference with Van Weelde's contractual obligations, and (4) disparagement of Van Weelde's name in the business community.[16] The cornerstone of these allegations is that

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is not appealable under § 1291 unless it would "be effectively unreviewable on appeal from a final judgment." *Id.* at 376, 101 S.Ct. at 674, 66 L.Ed.2d at 580.

15. Defendants also argue that even if the September 13, 1983 order is appealable, our review may only encompass the district court's decision to release defendants' security, and that we cannot address the propriety of the court's decision to order counter-security in the first place. They maintain that since counter-security was first required by the order of September 24, 1982, any appeal of that decision is time-barred. *See* F.R.App.P. 4(a)(1). This argument ignores the fact that the very order from which plaintiffs appeal expressly repeats the directive that plaintiffs post counter-security for defendants' counterclaim. *See*, *supra* note 9. The requirement that plaintiffs post counter-security being part of the September 13, 1983 order, it is properly before us for review. 28 U.S.C. § 2106.

Nor is the fact that plaintiffs' Notice of Appeal refers only to the sanctions section of the September 13 order fatal to our jurisdiction. The requirement of F.R.App.P. 3(c) that a notice of appeal designate the judgment from which it is taken is not to be so strictly construed as to defeat an appeal where appellant's overriding intent to appeal is clear. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *see Comfort Trane Air Conditioning v. Trane Company*, 592 F.2d 1373, 1390 at n. 15 (5th Cir.1979); *U.S. v. Stromberg*, 227 F.2d 903, 904 (5th Cir.1955).

16. The pertinent portions of defendants' counterclaim are as follows:

> COUNT XXI
>
> For further cause defendant, Van Weelde Bros. Shipping, Ltd., would show that Plaintiffs lack any standing to assert an *in rem* claim against the vessel. No rights or title to goods have accrued to Plaintiff since the bills of lading were fraudulently issued. Moreover, Plaintiffs derive their contract of carriage, if any exists, by virtue of unauthorized acts of a third party not through any actions of the owner of the vessel or his employees.

plaintiffs had no right to employ the admiralty rules to arrest the SANG JIN in the first place. Since the admiralty is not concerned with common law labels as to theories of recovery, or causes of action, *see Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550, 1957 A.M.C. 597 (1959), we are entitled to treat this broadly as a claim for wrongful seizure, whether denominated as such or as one for abuse of process, malicious prosecution, or all three.

In *Frontera Fruit Co. v. Dowling*, 91 F.2d 293, 1937 A.M.C. 1259 (5th Cir. 1937), we held that the right to recover damages for wrongful seizure of a vessel is based on a showing of bad faith, malice or gross negligence on the part of the libellant. *Id.* at 297, 1937 A.M.C. at 1266. Since that time, we have had occasion to decide, on the basis of *Frontera*, whether such bad faith existed as to warrant the award of damages for a wrongful seizure in admiralty. *See e.g., Cardinal Shipping Corp. v. M/S SEISHO MARU*, 744 F.2d 461 (5th Cir.1984); *TTT Stevedores of Texas, Inc. v. M/V JAGAT VIJETA*, 696 F.2d 1135 (5th Cir.1983); *Tampa Ship Repair & Dry*

The bills of lading in question bear neither the signature of the Master nor anyone authorized by him. Thus, Plaintiffs may have a claim against the wrongdoing party who issued the fraudulent bills but does not have a cause of action against those who neither knew of the fraud nor participated in it, neither have they any *in rem* action against the property of such innocent parties. Accordingly, Plaintiffs are liable for the wrongful seizure of the M/V SANG JIN and all damages arising or a result of Plaintiffs' wrongful seizure. . . .

COUNT XXIII

For further cause Defendant, Van Weelde Bros. Shipping, Ltd., would show that the plaintiffs' grossly excessive and improper demand for security has subjected Defendant, to unnecessary and unwarranted expenses. Accordingly, plaintiffs are liable for all of Defendant's damages resulting from plaintiffs' grossly excessive and improper demand for security. . . .

Dock Co. v. Esso Export Corp., 237 F.2d 506, 1956 A.M.C. 217 (5th Cir.1956). In none of these cases, however, were we required to decide the precise issue presented to us on this appeal: whether a counterclaim for wrongful seizure is an appropriate basis for requiring counter-security to be posted under Admiralty Rule E(7), or its predecessor, former Admiralty Rule 50.[17] Upon examination of the intent of the Rule, we are of the opinion that counter-security should not be ordered for such a claim.

[6] Under the terms of Rule E(7), counter-security may be required when a counterclaim is asserted which arises "out of the same transaction or occurrence" as the original libel. This language is identical to that defining compulsory counterclaims under F.R.Civ.P. 13(a). Thus, as Professor Moore has suggested, we can draw guidance on the proper scope of Rule E(7) by examining the test for counterclaims under F.R.Civ.P. 13(a). 7A J. Moore & A. Pelaez, *Moore's Federal Practice*, E-727 (2d ed. 1983).

[7, 8] Under the broad test for Rule 13(a) adopted by this Circuit, a counterclaim is compulsory when there is any "logical relationship" between the claim and the counterclaim. *Plant v. Blazer Financial Services*, 598 F.2d 1357 (5th Cir. 1979). *See also* 6 C. Wright & A.

---

17. Admiralty Rule 50:

> Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel suit was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given, unless the court otherwise directs.

Miller, *Federal Practice & Procedure* § 1410 (1971) (indicating breadth of this test). However, even under this liberal standard, it is clear that an action in the nature of wrongful seizure or malicious prosecution does not lie as a compulsory counterclaim under F.R.Civ.P. 13(a). *See, e.g., Olsen v. Puntervold*, 338 F.2d 21 (5th Cir.1964) (malicious prosecution); *U.S. General, Inc. v. City of Joliet*, 598 F.2d 1050 (7th Cir. 1979) (malicious prosecution). *See generally* 3 J. Moore, *Moore's Federal Practice* ¶ 13.13, 13–78, n.26 (2d ed.1984).

Such a counterclaim not "arising out of the same transaction or occurrence" as the original action for purposes of federal practice, and there being neither history nor practice in the admiralty suggesting any difference, we see no justification for applying Rule E(7) to a broader class of counterclaims than that permitted under F.R.Civ.P. 13(a).[18] This is especially appropriate in light of the 1966 Unification of Admiralty and Civil Practice. We therefore conclude that, whether or not an action for

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18. As the Supreme Court has stated,

> Traditionally, admiralty has narrowly circumscribed the filing of unrelated cross-libels and defenses. . . . [V]arious reasons have been offered for refusal to entertain unrelated defenses: protection of the seaman's wage claims; preservation of relatively simple proceedings not affecting third-party rights; and the recognition that allowing cross-libels might deprive litigants of jury trials to which they would otherwise be entitled if the cross-libel were pressed in an independent proceeding.

United States v. Isthmanian SS Co., 359 U.S. 314, 320, 79 S.Ct. 857, 860–61, 3 L.Ed.2d 845, 849–50, 1959 A.M.C. 1332, 1337 (1959). Given this traditional narrow construction, the court concluded:

> The law on this point in admiralty has been settled beyond doubt in the lower courts for many years and an Admiralty Rule of this Court recognizes this case law. We think that if the law is to change it should be by rulemaking or legislation and not by decision.

Id. at 323, 79 S.Ct. at 862, 3 L.Ed.2d at 851.

wrongful seizure, abuse of process or malicious prosecution may be asserted as a counterclaim in admiralty practice, counter-security under Rule E(7) may not be required for such a claim.

This holding is supported by the decisions of the federal courts which have considered this precise question. In *Amerada Hess Corp. v. S.S. ATHENA*, 1984 A.M.C. 130 (D.Md.1984), the court denied defendant's request for counter-security based on counterclaims alleging abuse of process and wrongful use of civil proceedings. In denying counter-security, the court reasoned that, since such a counterclaim would not be permitted under F.R.Civ.P. 13(a), it could not be the basis for requiring counter-security under Admiralty Rule E(7). *Id.* at 132.

A similar conclusion was made under former Admiralty Rule 50 in *Solomon v. Bruchhausen*, 305 F.2d 941, 1963 A.M.C. 210 (2d Cir. 1962), *cert. denied sub nom Isbrandtsen v. Maximo*, 371 U.S. 951, 83 S.Ct. 506, 9 L.Ed.2d 499, 1963 A.M.C. 1646 (1963). There, the district court had ordered libellants to post counter-security for respondent's cross-claim of abuse of process in the arrest of respondent's vessels. The Second Circuit dismissed the cross-claim stating that an action for abuse of process could not be considered to have arisen out of the original action.[19]

---

19. While the *Solomon* court held that a claim of wrongful seizure would not lie at *all* as a cross-claim in admiralty, 305 F.2d at 943, we do not decide that question. We merely hold that counter-security may not be required under Rule E(7) for such a claim. We observe, however, that other courts have reached the same conclusion as the court in *Solomon*. *See, Maritime Terminals v. M/S JAN*, 1978 A.M.C. 1936 (N.D.Ill.1978) (claim of wrongful arrest does not lie as cross-claim in admiralty); *United States v. M/V PITCAIRN*, 272 F.Supp. 518 (E.D.La.1967) (wrongful seizure claim does not arise out of the same cause of action as the original libel).

We thus decide that the district court improperly ordered the posting of security for defendants' counterclaims. Having found appellate jurisdiction to decide this issue, plaintiffs' petition for Writ of Mandamus in No. 83-2627 is mooted, and is therefore dismissed.

For the foregoing reasons, the district court's order requiring appellant to post counter-security is vacated, and the cause remanded for further proceedings.

VACATED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2571 & 83-2627

INCAS AND MONTEREY PRINTING AND PACKAGING, LTD.,
Plaintiffs-Appellants,

v.

M/V SANG JIN, her engines, tackle, apparel, etc., in rem, Joong Ang Shipping Co., Van Weelde Brothers Shipping Ltd. and Grundvig Chartering, Inc.,
Defendants-Appellees.

In re INCAS AND MONTEREY PRINTING AND PACKAGING LTD., Petitioners.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 12/03/84, 5 Cir., 198__, _____ F.2d _____)
(January 4, 1985)

Before BROWN, GEE and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee, Jr.

THOMAS GIBBS GEE, JR.
United States Circuit Judge

Filed: January 4, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INCAS AND MONTEREY
PRINTING &
PACKAGING, LTD.

v.

M/V SANGJIN, ETC.,
ET AL

CIVIL ACTION
NO. H-82-2573

ORDER

Pending before the Court is Defendant Van Weelde Brothers Shipping, Ltd. and Claimant Joong Ang Shipping Co., Ltd.'s motion for sanctions for failure of Plaintiff to post Court ordered counter-security. The motion is opposed.

Plaintiffs effected judicial arrest of the M/V SANGJIN on September 3, 1982, and on September 10, 1982, the Court ordered that the vessel be released only upon posting of security by those at interest with the vessel in the amount of $1,600,000.00. Plaintiffs were ordered to post security in the amount of $125,000.00 to secure Defendant Van Weelde's possessory lien on cargo being stored in Florida. Thereafter, as an accommodation, arrangements were made with Plaintiffs whereby the cargo in Florida would be released without the posting of the Court ordered security in exchange for a reduction of $125,000.00 in the amount of the security ordered to be posted by the vessel's interest by the Court for release of the vessel.

On September 17, 1982, Defendant Van Weelde Brothers Shipping, Ltd. filed its Answer and Counterclaim along with a Motion and Brief for Security on their Counterclaim against Plaintiffs. On September 20, 1982,

a chambers conferece was held on the question of counter security and the Court ordered that upon the posting of security to release the vessel by those at interest with the vessel cargo would be obliged to post counter security in the equivalent amount.

In accordance with the ruling of September 20, 1982, the Court, on September 24, 1982, entered an Order with respect to counter security as follows:

> Upon the posting of alternative security by those parties who have an interest in the M/V SANGJIN, in the amount of $1,475,000.00, for the release of the M/V SANGJIN, the Plaintiffs, Incas and Monterey Printing & Packaging, Ltd. shall also post an equivalent amount of $1,475,000.00 in security on Defendant's, Van Weelde Bros. Shipping, Ltd. Counterclaim.

Also on September 24, 1982, those at interest with the vessel advised the Court that security in the total amount of $1,475,000.00, in the form of $375,000.00 to be deposited in the registry of the Court and a P & I Club Letter of Undertaking in the amount of $1,100,000.00 to be issued pursuant to the Club's rules of coverage, specifically excluding claims for second freight, etc., was in hand, but that upon tender of such security to Plaintiffs through their counsel of record it had been rejected as allegedly inadequate to secure Plaintiffs' claim for second freight and associated expenses. The Court ordered that the M/V SANGJIN be released from arrest in exchange for the security being posted. Subsequently, the $375,000.00 was deposited in the registry of the Court and a binding promise of the P & I Club Letter of Undertaking in the amount of $1,100,000.00, issued pursuant to Club rules excluding claims for second freight, etc. was made and the vessel was released.

Accordingly, pursuant to the Court's Order regarding counter security, Plaintiffs were obliged to post counter security in the amount of $1,475,000.00 upon the posting

of security by those at interest with the vessel on September 24, 1982.

Plaintiffs have failed to post the counter security in accordance with the September 24, 1982, Order of the Court but instead have filed several motions for reconsideration of the Court's September 24, 1982, order which were denied by the Court on March 16, 1983. Upon consideration of Defendants' motion, Defendants' Supplemental memorandum in support of its motion and Plaintiff's response, and upon examination of the record, it is the opinion of the Court that Plaintiff's failure to obey the Court's September 24, 1982 order is without justification. Accordingly, sanctions are appropriate.

Defendants in their motion for sanctions seek to have the Court lift the obligation of alternate security from those at interest with the vessel with the effect that the funds deposited in the registry of the Court will be returned and the P & I Club Letter of Undertaking Obligation cancelled. This sanction is reasonable to the Court.

It is therefore,

ORDERED that Plaintiffs will post security into the registry of the Court in conformity with the Court's September 24, 1982, order within 10 days of the date of this Order. It is further ORDERED that upon Plaintiff's failure to comply with the terms of this Order, Defendant's motion for sanctions is GRANTED and the Order of the Court requiring Defendants to post security is VACATED.

DONE at Houston, Texas, this 13 day of September, 1983.

/s/ Ross N. Sterling
ROSS N. STERLING
United States District Judge

Filed: September 13, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INCAS AND MONTEREY
PRINTING &
PACKAGING, LTD.

v.

M/V SANG JIN, ETC.,
ET AL

CIVIL ACTION
NO. H-82-2573

ORDER

The motion of Plaintiffs Incas and Monterey Printing and Packaging, Ltd. to approve security having come before the Court for hearing, and the Court having considered the motion is of the opinion that the security offered by Plaintiffs is inadequate to comply with the September 24, 1982 order of the Court which requires the posting of counter security in the amount of $1,475,000.00 in United States dollars.

It is, therefore,

ORDERED that security in the form of letters of undertaking from the Central Bank of Somalia and the Standard Bank of Zambia tendered by Plaintiffs to Defendants Van Weelde Brothers Shipping, Limited and Joong Ang Shipping Co. is not approved and that Plaintiffs' motion is DENIED.

DONE at Houston, Texas, this 13 day of September, 1983.

/s/ Ross N. Sterling
ROSS N. STERLING
United States District Judge

Filed: September 13, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INCAS AND MONTEREY PRINTING AND PACKAGING, LTD.,
Plaintiffs,

vs. C.A. NO. 82-2573

M/V SANG JIN, her engines, tackle, apparel, etc., *in rem*, and JOONG ANG SHIPPING CO., her owners and/or operators, VAN WEELDE BROTHERS SHIPPING LIMITED, her owner pro hac vice and/or charterer and/or operator, and GRUNDVIG CHARTERING, INC., her charterer and/or sub-charterer and/or operator, *in personam*,
Defendants

ORDER

On September 20, 1982, a hearing was held by this Court in Chambers on Defendant's, Van Weelde Brothers Shipping, Limited, Motion to Require Plaintiffs, Incas and Monterey Printing and Packaging, Ltd., to Post Security. The charterer, Van Weelde Brothers Shipping, Limited, vessel owner and Plaintiffs, were represented by counsel who presented the facts to the Court. After

having heard and considered said representations and oral arguments, it is hereby:

ORDERED, ADJUDGED and DECREED:

That upon the posting of alternative security by those parties who have an interest in the M/V SANG JIN, in the amount of $1,475,000.00, for the release of the M/V SANG JIN, Plaintiffs, Incas and Monterey Printing and Packaging, Ltd. shall also post an equivalent amount of $1,475,000.00 as security on Defendant's, Van Weelde Brothers Shipping, Limited counterclaim.

DONE at Houston, Texas, this 24th day of September, 1982.

/s/ Ross N. Sterling
ROSS N. STERLING
United States District Judge

Filed: September 24, 1982

Office - Supreme Court, U.S.
FILED
MAY 1 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VAN WEELDE BROTHERS SHIPPING LIMITED, and
JOONG ANG SHIPPING CO., LTD.,
Petitioners,

vs.

INCAS AND MONTEREY PRINTING AND PACKAGING, LTD.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether there is presented a sufficient question as to whether Supplemental Rule C violates the due process clause of the United States Constitution.

2. Whether this Court should review the construction of Supplemental Rule E(7) made by the court of appeals in this case.

TABLE OF CONTENTS

	Page
Statement Of The Case	1
Summary Of The Argument	7
Reasons For Denying The Writ:	
I. The Court of Appeals Simply Interpreted The Wording Of Supplemental Rule E(7) Without Addressing The Broad, Equitable Power Of The District Court, Sitting In Admiralty, To Require Counter-Security For A Counterclaim Which Did Not Arise Out Of The Same Transaction Or Occurrence As The Original Action	9
II. There Is No Conflict Between The Circuits As To The Equitable Power Of A District Court To Require Counter-Security, The Constitutionality Of Rules B and C, Or The Interpretation Of Rule E(7)	10
A. Equitable Power of a District Court to Require Counter-Security	10
B. Constitutionality of Rules B and C	11
C. Interpretation of Rule E(7)	14
III. The Opinion Of The Court Of Appeals In This Case Is Not In Conflict With The Decisions Of This Court	15
A. Equality of Security	15
B. Compulsory Counterclaim Rule	19
Conclusion	21

Certificate of Service 23

Appendix A-1

TABLE OF AUTHORITIES

Cases:

Amstar Corp. v. S/S ALEXANDROS T., 664 F.2d 904 (4th Cir. 1981) 11

Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648 (2d Cir. 1979) 11

Cardinal Shipping Corp. v. M/S SEISHO MARU, 744 F.2d 461 (5th Cir. 1984) 20

Empresa Maritima a Vapor v. North & South American Steam Navigation Co., 16 F. 502 (S.D.N.Y. 1883) 7, 15, 22

Merchants National Bank v. The Dredge GENERAL G. L. GILLESPIE, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed,* 456 U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865 (1982) 9, 10, 11, 22

Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926) 19, 20

Plant v. Blazer Financial Services, Inc., 598 F.2d 1357 (5th Cir. 1979) 20

Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982) 11

Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi, 732 F.2d 1543 (11th Cir. 1984), *petition for rehearing en banc granted,* 743 F.2d 763 (1984) .. 7, 15, 22

Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 266 U.S. 629, 44 S.Ct. 224, 68 L.Ed. 480 (1924) 7, 15, 22

Rules:

Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B 21

Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C 21

Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(7) ..... *passim*

Eleventh Circuit Rule 26(k) 15

No. 84-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VAN WEELDE BROTHERS SHIPPING LIMITED, and
JOONG ANG SHIPPING CO., LTD.,
Petitioners,

vs.

INCAS AND MONTEREY PRINTING AND PACKAGING, LTD.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' Statement of the Case omits certain key elements of this litigation, and Petitioners' representation of the facts of this case distorts the overall testimony of the witnesses by quoting isolated bits of testimony taken during depositions which lasted many hours.

The facts as stated in the opinion of the United States Court of Appeals for the Fifth Circuit are accurate, but we wish to supplement same.

Although initially Respondents were not given an adequate opportunity in the district court to explain their inability to post

counter-security for the counterclaims of Van Weelde Brothers Shipping, Limited[1] as ordered by the district court, Respondents subsequently, in support of their Motion to Reconsider, did fully advise the district court of the impossibility of their posting such counter-security. It was not the financial inability of Respondents themselves that made same impossible but the inability of their poor, Third World, African countries, namely, Somalia and Zambia, to externalize sufficient hard, western currency to comply with the order of the district court that they post a bond in the amount of $1,475,000.

In support of their Motion to Reconsider, Respondents filed in the district court affidavits of Adan Abdi Hussein, President of Incas in Somalia, and Michael Gordon Purslow, Managing Director of Monterey Printing & Packaging, Ltd. in Zambia, establishing the inability of those countries to externalize such funds. Copies of both affidavits appear in the Appendix at pages A-1 and A-9.

Mohamed Warsame Elmi, General Director of Incas, testified at his deposition[2] as follows:

> Q: What did [the Bank] tell him with respect to the money for the bond?
>
> A: That they didn't have the money to pay such a sum, amount.
>
> Q. Did they indicate whether they would be able to have that money at any time in the future?

---

[1] Only Van Weelde, the charterer, has filed a counterclaim. Joong Ang Shipping Co., the owner of the M/V SANG JIN, has filed no counterclaim.

[2] It should be noted that Mr. Elmi was questioned through an Italian translator and various difficulties were encountered with the language barrier during the deposition.

A. No.

Q. Is this a problem with the availability of foreign currency or is it a problem of the bank in Somalia not having much money or is it a problem of the bank in Somalia not being willing to lend Incas that much money?

A. Practically, it is a problem with foreign currency.

Q. How hard is it for Somalian companies to obtain foreign currency?

A. It is very difficult with the bank because they are always on short touch of foreign currency.

* * *

Q. Is the Somalian shilling readily traded in financial markets around the world?

A. No, not the Somalian shilling.

Q. Is there any way that Incas can obtain foreign currency without going through the Bank of Somalia?

A. No. There aren't any.

* * *

A portion of the affidavit of Michael G. Purslow, Managing Director of Monterey, reads as follows:

> [I]t is simply not possible for my company to provide security, or indeed any part thereof, which has been ordered in favour of the Defendants. The reasons for that inability result from the severe restrictions on the use of limited foreign exchange resources to which I have referred above. My company has, nevertheless, made application to the Bank of Zambia in order to endeavour to obtain the necessary allocation of foreign exchange which would enable security to be provided; at the time such application

was made the sum of US $2.96 million, being the quantum of the Defendants' notified Counterclaim, was requested. That request has been firmly rejected as evidence of which there is now produced and shown to me a true copy of a telex dated 13th October 1982 from the Bank of Zambia which is Exhibit "MGP 1" hereto. Throughout the period concerned I have maintained close and regular touch with those concerned at the Bank of Zambia and it has been made quite clear to me, although this is not clear from the telex which is Exhibit "MGP 1" hereto, that even if a lesser sum had been requested this too would have been refused. In short, the Bank of Zambia, as custodian of the country's foreign exchange resources, is not prepared to allocate any of such scarce resources for the purpose requested.

Purslow Affidavit (October 14, 1982) at para. 11.

At Mr. Purslow's deposition, he testified as follows:

Q: Are you aware that the judge has ordered you and INCAS to post counter security?

A. Yes.

Q. What attempts have you made to comply with the Court's order?

A. Well, we have made a great number of attempts and put a great deal of effort into this and to the best of your [sic] ability, we have posted counter security as of—I would think we are waiting for a letter of guarantee from our bankers indicating this. Unfortunately, yesterday was a holiday in Zambia when I left but I would assume it would be issued, made to our lawyers on Wednesday or Thursday of this week and we, as a company, have been debited a half a million kwacha to allow that guarantee to be posted.

Q. Okay, what is the procedure of changing kwachas for dollars? You talk about the exchange commission—

A. Exchange control.

Q. Exchange control.

A. Well, it's all controlled by the Bank of Zambia, the exchange department.

Q. Is the Bank of Zambia the only bank in Zambia?

A. No, no, but it's the central bank and the only bank that has any authority in exchange control.

Q. What is the procedure for exchange?

A. Well, you can apply for whatever source or purpose you have of it. It will either be agreed or approved or denied and the difference between agreed and approved, if you, if it's agreed, you get it straight away. If it's approved, the supplier, the local funds is debited and then it goes into a pipeline along with many other debts.

Q. How long does that take?

A. It depends. There are various pipelines and import pipelines which now go back to September, 1979. There are personal piplines which go back two years, dividends pipelines.

Q. I'm sorry, I'm confused. You say it goes back?

A. That was the last time money was externalized against those particular bills.

* * *

Q. And I understand that, you made an application to the Bank of Zambia sometime back in October of last year to get your portion of the counter security?

A. Well, immediately as this was notified us, we made a normal application and this was rejected out of hand and we asked for a full figure in U.S. dollars and see what the

> reaction was. There then followed a considerable series of discussions with the Bank of Zambia as to ways and means of doing something about this because we could see problems rising from our side. The situation there is you try to avoid getting anything in writing because once they put something in writing, that's it, that's finished. So we have access as a major company in the country through the Bank of Zambia personnel with the major Government and deputy governor and we try in every possible way and eventually, as recently as the middle of June, eventually got sanction to put up this security in kwacha.

Relative to the letter of guarantee by the Central Bank Mr. Purslow stated:

> I might say, the Central Bank pays nothing. We pay as a company. I have already paid, security has been paid and the only security we have control of we trade in kwachas, we make our profit in kwacha and we get paid in kwacha so we have to put up the required security in the only currency available to us. Because of the requests we have made, we have made application to the bank to see if this security could be converted into another currency. This has been denied.

When the district court denied Respondents' Motion to Reconsider, Respondents offered to post counter-security in the local currencies of Somalia and Zambia, but the district court declined to accept such counter-security.

Upon failure of Respondents to post counter-security in United States currency, the district court ordered the initial security posted by Petitioners to be released, which would have effectively concluded the *in rem* aspect of this litigation but for the timely appeal to the United States Court of Appeals for the Fifth Circuit, which court reversed the district court.

It was inappropriate for Petitioners to argue in their Statement of the Case that Respondents' efforts to post counter-

security were a "sham" or that stockholders of Respondents might have been in a position to post counter-security in hard currency had they so desired. It was also highly inappropriate for Petitioners to comment upon the fact that Respondents are able to obtain legal representation, when invoices for their lawyers' services are long past due.

The district court based its decision on its interpretation of Supplemental Rule E(7) and this is the ruling which was reversed by the court of appeals.

SUMMARY OF THE ARGUMENT

Petitioners efforts to create a constitutional question in this case are strained. The court of appeals simply held the counterclaims of Van Weelde alleging wrongful arrest, etc. did not arise out of the same transaction as Respondents' claims for breach of contract of affreightment, wrongful deviation and conversion of Respondent's cargo and that, therefore, the district court had no authority under Supplemental Rule E(7) to require Respondents to post counter-security. The question of the powers of the district court apart from Rule E(7), such as under its equity power, was not addressed by the court of appeals.

The interpretation by the court of appeals of Rule E(7) creates no conflict among the circuits, as the only contrary opinion, that of the Eleventh Circuit in *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi*, 732 F.2d 1543 (11th Cir. 1984), was subsequently vacated by that court.

Petitioners argue that the decision of the court of appeals is in conflict with the decision of this Court in *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 266 U.S. 629, 44 S.Ct. 224, 68 L.Ed. 480 (1924). However, *Washington-Southern Navigation Co.* was based upon the opinion in *Empresa Maritima a Vapor v. North & South American Steam Navigation Co.*, 16 F. 502 (S.D.N.Y. 1883), where both

the original claim and the counterclaim arose out of the same transaction, namely the same charter party.

Lastly, Respondents have made a prima facie case establishing their good faith efforts to comply with the orders of the district court based upon an erroneous interpretation of Rule E(7). Gross injustice would result if Respondents were denied their day in court on the merits of this case because of their inability to post counter-security.

REASONS FOR DENYING THE WRIT

I

The Court Of Appeals Simply Interpreted The Wording Of Supplemental Rule E(7) Without Addressing The Broad, Equitable Power Of The District Court, Sitting In Admiralty, To Require Counter-Security For A Counterclaim Which Did Not Arise Out Of The Same Transaction Or Occurrence As The Original Action.

In their strained effort to present a constitutional question to this Court, Petitioners seem to be saying that by failing to address the equity powers of district courts sitting in admiralty to require counter-security, the court of appeals was in some way denying the existence of such equitable powers. Although the court of appeals did not address that question in this case, Petitioners go back to a former case, *Merchants National Bank v. The Dredge GENERAL G. L. GILLESPIE,* 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed,* 456 U.S. 966 (1982), in which the Fifth Circuit did make mention of such equitable powers.

In the instant case, Petitioners never sought to avail themselves of the equitable powers of the district court with respect to security but relied solely on the provisions of Rule E(7). The court of appeals held that Rule E(7) made provision for counter-security only with respect to counterclaims arising out of the same transaction or occurrence as the original action and that the counterclaims of Van Weelde for wrongful arrest of the M/V SANG JIN arose out of a different transaction from the voyage which gave rise to Respondents' claims.

In stating the issue on the merits in this case the court of appeals said: "This brings us to plaintiffs' contention that Van Weelde's counterclaims are not the type for which counter-security may be required under Admiralty Rule E(7)." *Incas and Monterey Printing and Packaging Ltd. v. M/V SANG JIN,* 747 F.2d 958, 963 (1984). The court of appeals then stated:

"Under the terms of Rule E(7), counter-security may be required when a counterclaim is asserted which arises 'out of the same transaction or occurrence' as the original libel." *Id.* at 964. The court then held:

> We therefore conclude that, whether or not an action for wrongful seizure, abuse of process or malicious prosecution may be asserted as a counterclaim in admiralty practice, counter-security *under Rule E(7)* may not be required for such a claim.

Id. at 965 (emphasis added).

The court of appeals did not decide nor even speak to the question of equitable powers of the district courts sitting in admiralty to require counter-security, nor did Petitioners raise such issue, and there is no valid reason for this Court to address that question now.

II

There Is No Conflict Between The Circuits As To The Equitable Power Of A District Court To Require Counter-Security, The Constitutionality Of Rules B And C, Or The Interpretation Of Rule E(7).

A. Equitable Power Of A District Court To Require Counter-Security.

As already stated, the court of appeals did not decide this case on the question of the equitable powers of district courts to require counter-security in admiralty, but only on its interpretation of Rule E(7). If by some straining of the imagination, the failure of the court of appeals to address such question in some way impinges upon the equity powers of the district courts in admiralty, there would still be no conflict among the circuits, as the only court of appeals to mention such equity powers with respect to counter-security is the Fifth Circuit itself in *Merchants National Bank v. The Dredge GENERAL G. L.*

GILLESPIE, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982).[3]

B. Constitutionality of Rules B and C.

All the courts of appeals which have considered the constitutionality of the admiralty arrest procedures have upheld the constitutionality of same and thus have laid to rest the constitutional question.[4] As was stated by the Fifth Circuit in *The Dredge GEN. G. L. GILLESPIE:*

> The problems associated with enforcement of a maritime lien by the seizure of a vessel bear little or no resemblance to the garnishment of wages or the replevin of a consumer's stove. The present controversy involves the constitutionality of *in rem* arrest only. Under traditional admiralty law, maritime property is subject to arrest in order to enforce a maritime lien. *The maritime lien has at its basis, to a substantial extent, the historical and theoretical concept of personification: a vessel is liable, as such, for torts and contracts even though the owner may or may not be.* Contrary to the District Court's opinion in *Karl Senner v. M/V ACADIAN VALOR*, 485 F.Supp. 287 (E.D.La.) 1980 A.M.C. 1, the doctrine that the vessel itself has a liability, albeit articulated occasionally in part as a legal fiction, is fundamental in the context of arrest of

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[3] Interestingly enough, Judge Brown makes no mention of Rule E(7) in his opinion in that case.

[4] *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904 (4th Cir. 1981); *Merchants National Bank v. The Dredge GENERAL G. L. GILLESPIE*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966, 72 L.Ed.2d 865 (1982); *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979).

vessels. It is no fiction that the law recognizes that a maritime lienor has an *interest* in the vessel. That is a legal fact.

* * *

A maritime lien gives to its holder a property right in a vessel, and the proceeding *in rem* is simply a means of enforcing the property right. Whether the maritime lien arises by operation of law from a tort, from the supplying of goods, services and necessaries to a vessel, or from a preferred ship mortgage like those in the present controversy, the maritime lienor has an interest in the vessel herself, and the arrest of the vessel is to enforce that interest, the maritime lien. The action is to enforce a property right in the vessel.

Arrest in admiralty *in rem* regards the vessel as the interest concerned, and the seizure *in rem* of a vessel accomplished under Rule C brings notice of the action to all persons having an interest in the vessel. The owner of a vessel, as claimant, is clearly an interested person having the right to due process of law before his property is sold. The Admiralty takes care of this right by expressly allowing the owner (or its representative such as the shipmaster) to file a claim and answer. The owner, however, is not a necessary party to the action *in rem*.

663 F.2d at 1345-46 (footnotes omitted) (emphasis added). Similarly, *in Amstar* the Fourth Circuit stated:

We have little doubt that rule C would be invalid if its constitutionality were to be measured solely by the principles explained in *Sniadach* and the other cases on which Nava relies. Our first inquiry, therefore, is whether *Sniadach* and other cases involving common law procedures apply to rule C.

Congress and the Court have always recognized that maritime law differed from the common law. In the Act

that granted the Supreme Court its authority to promulgate procedural rules, Congress provided: "[T]he forms of writs, executions and other process . . . [in suits of] . . . admiralty and maritime jurisdiction, [shall be] according to the principles, rules and usages which belong to courts . . . of admiralty . . . as contradistinguished from courts of common law . . . ." Although rule C was promulgated in its present form in 1966, its provisions for the arrest of a vessel in an *in rem* action can be traced through the Admiralty Rules of 1920 and 1844 with little change. This procedure, moreover, was used long before it was embodied in the rule. Its purpose has always been to provide a means for enforcing a maritime lien, which is the central element of an *in rem* proceeding. Maritime liens, however, are not created by the rule. They are an integral aspect of substantive, rather than procedural, maritime law.

A maritime lien is an essential predicate for the arrest of a vessel in a private *in rem* action. Maritime law, with exceptions not pertinent to this case, gives a maritime lien to the owner of cargo that has been damaged aboard a vessel. *Quite different from a common law lien, a maritime lien is not simply a security device to be foreclosed if the owner defaults. The vessel itself is viewed as the obligor whether or not the owner is also obligated.* Substantive maritime law confers on the holder of a maritime lien a sufficient interest in the vessel to detain it for security and ultimately to subject it to condemnation and sale for satisfaction of the lien. The arrest of the vessel in the proceeding *in rem* is to accomplish this end. "The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise."

These principles were developed to meet the special needs of persons engaged in many aspects of maritme commerce. *By enforcing maritime liens through the arrest of vessels in in rem proceedings, admiralty enables people*

engaged in maritime commerce to obtain redress for certain kinds of injuries caused by the vessel and its crew without seeking compensation abroad from the vessel's owner. The owner, moreover, is not exposed to unlimited liability.

Sniadach and other cases invalidating state garnishment, attachment, and replevin statutes dealt exclusively with common law concepts rather than the unique concerns of maritime law. Neither in these cases nor in a closely related case upholding a sequestration statute based on civil law, did the Court advert to maritime law and practice. The omission is significant. The Court relied on precedents from many areas of the common law, but it found no occasion to refer to its decisions, written over a period of nearly two centuries, involving admiralty suits *in rem.* We, too, must give effect to the significant differences between the common law and admiralty. *The constitutionality of rule C must be determined in the light of the nautical background from which it evolved and with due regard to the substantive maritime law it serves.* Constitutional principles governing creditors' rights at common law cannot be applied mechanically to test the validity of rule C. Therefore, we cannot accept Nava's argument that *Sniadach* and related cases provide controlling precedent for this appeal.

664 F.2d at 907-09 (emphasis added) (footnotes omitted).

C. Interpretation of Rule E(7).

The court of appeals construed Rule E(7) as follows: "*Under the terms of Rule E(7),* counter-security may be required when a counterclaim is asserted which arises 'out of the same transaction or occurrence' as the original libel." *Incas,* 747 F.2d 958 at 964 (1984) (emphasis added).

A panel of one of the United States Courts of Appeals attempted a broader interpretation of Rule E(7) than that set forth by

the Fifth Circuit in this case. *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi,* 732 F.2d 1543, *petition for rehearing en banc granted,* 743 F.2d 763 (11th Cir. 1984) (A Rule B case). Since the Eleventh Circuit has granted a rehearing en banc, however, the original opinion has been vacated.[5] The panel said: "First, while the plaintiff need not post bond prior to execution, Supplemental Rule E(7) arms the defendant with the power to compel bond on any counterclaim it files." 732 F.2d at 1548. Such a statement that Rule E(7) allows the defendant to compel bond on "any counterclaim" collides head on with the clear and unambiguous language of Rule E(7), which provides that counter-security can be required "whenever there is asserted a counterclaim *arising out of the same transaction or occurrence* with respect to which the action was originally filed." (Emphasis added). Perhaps this language is one reason that decision has been vacated.

III

The Opinion Of The Court Of Appeals In This Case Is Not In Conflict With The Decisions Of This Court.

The decision of the court of appeals in this case is not in conflict with any decisions of this Court. No case from this Court is in conflict with the construction of Rule E(7) made by the court of appeals. However, we do wish to respond to Petitioners' argument that a 1924 decision of this Court is such a case.

A. Equality of Security

Petitioners contend that, in situations such as in our instant case, the reason for requiring counter-security is to place the parties on an equal basis. Petitioners cite as their authority *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.,* 263 U.S. 629, 44 S.Ct. 224, 68 L.Ed. 480 (1924), which is based upon the 1883 district court

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[5] 11th Cir. R. 26(k).

case of *Empresa Maritima a Vapor v. North & South American Steam Navigation Co.*, 16 F. 502 (S.D.N.Y. 1883). In *Empresa* the matter before the court was a charter party dispute which had begun as two separate suits with each plaintiff being the defendant in the alternate case and each claiming a breach of the same charter party. In this context, in speaking of the predecessor of Rule E(7) the language of the court becomes very important:

> The object of rule 53, I cannot doubt, was that in cases of cross-demands *upon the same subject of litigation* both parties should stand upon equal terms as regards security. It was designed, where the libelants in a suit *in rem*, through the arrest of the property, exact and obtain security for their own demand, that in a cross-suit *in personam* for a *counterclaim in respect to the same subject of litigation*, the defendants in the former suit should likewise be entitled to security for the payment of their demands, in case the decision of the court upon the point in controversy should be in their favor. The rule was designed to correct the inequality and injustice of the process of court *in rem* being used to obtain security in favor of one party, *in reference to a single subject of dispute*, while it was denied to the other.

16 F. at 504 (emphasis added). In a dispute over which of the two parties breached the charter party, the court was concerned that each should have an equal chance of recovery and each should be secured in the event the decision went in its favor. This result makes eminent sense when both claims arise out of the same subject matter of the litigation. In the instant case, however, the claims do not involve the same subject of litigation. Respondents' claims are based on the voyage of the SANG JIN on which the problems arose giving rise to Respondents' claims for breach of contract of affreightment, wrongful deviation and conversion of their cargo, whereas the claims of Van Weelde arise out of the subsequent arrest of the SANG JIN.

Also the court stated in *Expresa* that even when all claims arise out of the same subject matter, the requirement of counter-security is not inflexible:

> Where the respondents appear to have a meritorious case, and show circumstances proving their inability to give security under the rule, the court might, in its discretion, according to the circumstances, either deny the order for security altogether, or, on failure to give the security required, order the vessel to be sold, or to be discharged upon the claimant's own stipulation without other security.

16 F. at 505-06. Upon a subsequent hearing on affidavits the court stated:

> [I]t appeared that the original libelant was wholly insolvent, and without other substantial assets than the claim in suit; that it could not give security, except, possibly, after consultation with and assistance from the various creditors for whose benefit the suit was promoted. It did not appear that the owners of the vessel or her captain could not give bonds for at least a considerable part of the claim against her, and the motion for discharge of the vessel was therefore denied.

16 F. at 507. Respondents in the instant case not only demonstrated they were incapable of posting counter-security in U.S. dollars, but they have also satisfied the court of appeals that the counterclaims of Van Weelde did not arise out of the same transaction or occurrence as the claims of Respondents.

The court of appeals found that Respondents "have made an attempt to post counter-security, and have at least indicated a prospective inability to meet the court's demand." 747 F.2d at 963 n.11. This finding of the appellate court was based on the depositions and affidavits of the officers of Respondents.

The excerpts from the deposition of Mohamed Warsame Elmi, the General Director of Incas, set out in Respondents'

statement of the case adequately demonstrated the inability of Incas to post counter-security. To argue that Incas was engaged in a game or sham is fatuous and not supported by the facts.

Petitioners accuse Respondents of simply ignoring the requirement of the district court that Respondents post counter-security. Nothing could be further from the truth. Due to a mix-up for which the district judge was not responsible, the district court issued its original order requiring both sides to post security in equal amounts before Respondents' brief reached the district judge. Respondents then moved the district court to reconsider such order and submitted affidavits and a brief in support of such motion. When the district court denied such motion to reconsider and it was obvious the district court felt bound by Rule E(7) to require counter-security from Respondents in the same amount as the original security, Respondents sought permission of the district court to take an appeal to the United States Court of Appeals for the Fifth Circuit, but the district court denied Respondents' request.

As it was impossible for Petitioners to obtain externalization of funds from the local currencies of Somalia and Zambia into hard currency, Respondents offered to post counter-security in the local currency of each country, but, because of strong opposition by Petitioners, permission to post security in such local currencies was denied by the district court. At that time the district court ordered the release of the original security unless Respondents posted counter-security in United States currency within ten days. Then for the first time, Respondents had an appealable order.

Petitioners speculate that shareholders of the Respondent corporations may have been in a position to post counter-security on behalf of Respondents but ignore the fact that such shareholders were under no obligation to do so. Petitioners also argue that if the governments of Somalia and Zambia could externalize funds for any purpose whatever, such governments acted arbitrarily in declining to externalize funds at the request

of Respondents for the purpose of posting counter-security in this case. Petitioners ignore the fact that hard currency was in such short supply, it was reserved for emergencies such as paying the second freight on their much needed cargo of paper to enable some of their industry to operate.

The affidavits and depositions referred to in Respondents' Statement of the Case were sufficient to satisfy the court of appeals, and we submit Petitioners' arguments with respect to the facts of this case are irrelevant with respect to whether this Court should grant certiorari in this case.

Petitioners have succeeded in delaying the trial of this case on its merits for over two years on this side issue of counter-security, and we submit their petition for certiorari is nothing more than a continuance of their efforts to prevent this case from going to trial on its merits. Should Petitioners ultimately succeed, Respondents would be denied their day in court simply because their countries had insufficient funds to tie up $1,475,000 in hard, western currency, a situation over which Respondents have no control and as to which they are blameless.

B. Compulsory Counterclaim Rule

In their argument on this point Petitioners confuse joinder with requiring counter-security under Rule E(7). The application or inapplication of Rule E(7) has nothing to do with whether or not all parties and all claims should be joined in a single action as often as practical. Judge Brown's opinion in no way affects the joinder of the counterclaims of Van Weelde; it merely states that since the counterclaims do not arise out of the same transaction or occurrence, Rule E(7) does not authorize the district court to require Respondents to put up counter-security pursuant to Rule E(7).

Petitioners cite no cases with which the decision of the Fifth Circuit in this case conflicts. Although petitioners cite *Moore v.*

New York Cotton Exchange, 270 U.S. 593, 70 L.Ed. 750 (1926) the opinion of the court of appeals in this case does not conflict with it. In *Moore* the original claim stated a cause of action in anti-trust seeking to compel the New York Cotton Exchange to furnish trade quotations to the complainant. The Exchange counterclaimed to enjoin the complainant from purloining those trade quotations. Under those circumstances the counterclaim was unquestionably compulsory.

Petitioners do argue with the result reached by the Fifth Circuit and also object to the comparison by that court of Rule E(7) with the compulsory counterclaim rule.[6] Applying the four point test enunciated in *Plant v. Blazer Financial Services, Inc.,* 598 F.2d 1357 (5th Cir. 1979), to the case at bar as urged by Petitioners, one must conclude that the counterclaims asserted by Van Weelde do not arise out of the same transaction or occurrence as the original action. First, the issues of fact and law raised by the original claims and those raised by the counterclaims are not largely the same. All events giving rise to the original claims were over and done with before the events giving rise to the alleged counterclaims arose. All the wrongdoing of Petitioners with regard to the contract of affreightment, the deviation and conversion of Respondents' cargo was completed when Respondents filed their *in rem* action against the vessel and sought to have the vessel arrested.

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[6] Petitioners also criticize the Fifth Circuit for comparing the counterclaim of Van Weelde for wrongful seizure to a claim for malicious prosecution, saying such comparison was inappropriate, citing *Cardinal Shipping Corp. v. M/S SEISHO MARU,* 744 F.2d 461 (5th Cir. 1984). There is no mention in *Cardinal* of any claim for malicious prosecution, much less whether such claim could not be compared to a claim for wrongful seizure. Moreover, Petitioners' quotation from Judge Rubin's concurring opinion had to do with liability for attorney's fees. Judge Rubin, concerned about the cost of obtaining the release of a vessel wrongfully seized, albeit in good faith, said, "It is time to reconsider whether wrongful seizure, even if provoked in good faith, should not entail liability for attorney's fees, by statute if need be." *Id.* at 475 (Rubin, J., concurring).

Secondly, *res judicata* would not bar a subsequent suit on the counterclaims of Van Weelde. Regardless of the outcome of the original action, Van Weelde would still be able to bring its suit for wrongful seizure, abuse of process, interference with contractual relations and disparagement of its name in the business community. None of these claims relate in any way to the contract of carriage but instead all relate to the actions taken by Respondents to enforce their rights.

Thirdly, substantially the same evidence will not support or refute Respondents' claims as well as Petitioners' counterclaims and contrary to Petitioners' assertion in their brief, Respondents have never conceded that they would. The evidence which will establish Respondents' claims is separate in time and space from that which will establish Petitioners' counterclaims. All the events concerning the original claims took place in places other than Galveston, Texas (where the vessel was arrested) and at earlier times.

Fourthly, there is not any logical relation between the claims and the counterclaims. The only relation between the claims and the counterclaims is that had Respondents not sued Petitioners and had the ship arrested, Van Weelde would not have filed counterclaims against Respondents.

CONCLUSION

The requested writ of certiorari to the Court of Appeals for the Fifth Circuit should be denied for the following reasons:

1. The mere fact that the court of appeals made no mention of the equitable power of a district court sitting in admiralty to require counter-security does not render Rule B or Rule C unconstitutional as the appellate court decided this case solely on its interpretation of the provisions of Rule E(7).

2. There is no conflict among the circuits. The only decision of a court of appeals which mentions the equitable power of a district court in admiralty to require counter-security is the Fifth

Circuit in *The Dredge GENERAL G. L. GILLESPIE.* There is no decision of a court of appeals which conflicts with the interpretation given Rule E(7) by the Fifth Circuit. The only other decision which even mentions Rule E(7) in this context, *Schiffahrtsgessellschaft,* has been vacated.

3. The decision of the court of appeals does not conflict with any decision of this Court, particularly *Washington-Southern* since that case was based on *Empresa* wherein the claim and the counterclaim arose out of the same charter party. In the instant case the counterclaims did not arise out of the voyage on which Respondents' claims for breach of contract of affreightment, wrongful deviation and conversion of their cargo arose but arose out of the subsequent arrest of the SANG JIN.

4. Finally, no valid reason is presented which should cause this Court to grant certiorari in this case and the case should proceed to trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alex T. Howard, Jr., hereby certify that I have served three copies of the foregoing Brief in Opposition upon Petitioners herein, by mailing same to George J. Koelzer, Esquire, Evans, Koelzer, Osborne and Kreizman, One Harding Road, Red Bank, New Jersey 07701-0569, and Bradley A. Jackson, Esquire, Royston, Rayzor, Vickery and Williams, 220 Texas Commerce Tower, Houston, Texas 77002.

Alex T. Howard, Jr.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-82-2573

INCAS AND MONTEREY PRINTING
AND PACKAGING, LTD.,
Plaintiffs,

vs.

M.V. SANG JIN, her engines, tackle, apparel etc., *in rem*, and JOONG ANG SHIPPING CO., her owners and/or operators, VAN WEELDE BROTHERS SHIPPING LIMITED, her owner pro hac vice and/or charterer and/or operator, and GRUNDVIG CHARTERING, INC., her charterer and/or subcharterers and/or operator, *in personam*,
Defendants.

AFFIDAVIT

I, MICHAEL GORDON PURSLOW of 41 Dr. Damie Street, Ndola, Zambia MAKE OATH and say as follows:—

1. I am a British subject. I am the Managing Director of Monterey Printing & Packaging Limited of PO Box. SK 63, Ndola, Zambia ("Monterey") and have been so since June 1979. Prior to that time I was the Commercial Director with the same company from October 1976. I have lived and worked in Zambia for the past 6 years. The facts and matters deposed to by me herein are within my own knowledge. I am duly authorized by Monterey to swear this Affidavit.

2. Monterey is a company incorporated under the laws of the Republic of Zambia. It is a company which is principally concerned with manufacturing a variety of packaging materials in respect of which a substantial percentage of the necessary raw materials is imported. Amongst the

goods which Monterey regularly imports are Pure Virgin Kraft Liner and Semi-Chemical Fluting. Both these goods are used by Monterey for the manufacture of corrugated board which is then converted into a wide range of cartons. Of the total output of corrugated cartons about 50% is used for packaging explosives which are then used in the mining industry; this includes both the coal mines and, more importantly, the copper mines. By way of illustrating the importance of a secure chain of supply and indeed the importance to the Zambian economy of the imported goods to which I have referred, copper represents at least 95% of the foreign exchange earnings capability of Zambia.

3. In my capacity as Managing Director of Monterey, and indeed throughout the period of 6 years which I have worked in Zambia, I have been responsible for all matters relating to the importation of raw materials as a result of which I have considerable experience of dealing, inter alia, with

   (a) the Ministry of Commerce and Industry for the purposes of obtaining import licenses;

   (b) the Bank of Zambia, which is the Central Bank, for the purposes of obtaining foreign exchange allocations;

   (c) Monterey's own bankers who are Standard Bank (Zambia) Limited, a subsidiary of Standard & Chartered Bank, for the purposes of obtaining letter of credit facilities; and

   (d) suppliers and finance houses respectively for the purposes of securing the necessary goods which my company imports and for arranging credit facilities.

4. The Zambian economy is almost totally dependent upon its copper exports and the health of the country's economy can reasonably be said at any particular time to be measured by the prevailing world price for copper. This is

effectively reflected in the daily London Metal Exchange quotations. The year 1982 has seen the lowest world prices in real terms for copper over the past 20 years. It follows from what I have said above that the country's economy is presently in a parlous state as a result of which such limited foreign currency reserves as exist are increasingly very carefully controlled. The ability of a company like Monterey to obtain foreign exchange facilities is becoming increasingly difficult. By way of confirmation of what I have said above it is of interest that in a programme entitled "The World Today" broadcast by the BBC World Service on 13th October 1982 the presenter commenced by saying the following:

"The Government of Zambia has just introduced a series of measures to halt the decline of its foreign currency reserves now believed to be at their lowest level in the country's history. Controls are being tightened on foreign exchange being used to pay for imports and restrictions put on many forms of money transfer out of the country. The measures reflect a further deterioration of Zambia's already desperate trading position...."

In the same programme a journalist of the African Economic Digest said, inter alia, the following:

"The cause is simple. World depression has led to a sharp reduction in copper prices in Zambia which depends on copper for 95% of its foreign exchange earnings and every time the price for copper falls by *L*1 on the international market that costs Zambia *L*½ million and at the moment Zambia is producing its copper at a loss. Prices are well under cost of production for Zambia and have been for a number of years, or at least 2 years. The foreign exchange situation has demanded that there be a cut back of allocations to industry and that has already had a cost...."

5. During May of this year I visited England for the purposes of obtaining finance for a range of raw material imports including Pure Virgin Kraft Liner and Semi-Chemical Fluting. I now particularly refer to the purchase my company made from Firn Overseas Packaging Limited of Hungerford, Berkshire of 750 tons of Pure Virgin Kraft Liner and 525 tons of Semi-Chemical Fluting for which contracts were concluded in June of this year. Having regard to the exchange control limitations to which I have previously referred it was necessary for my company to use the services of a company called Plenum Finance and Investment Limited of Hong Kong acting as a confirming house and who, in the first instance, arranged letter of credit facilities and who, in due course, have received payment from Monterey in local currency by means of bills of exchange drawn in their favour. Part shipment of the consignments to which I have referred was effected respectively at Savannah, Georgia and St. John, Canada when 679.777 metric tonnes of Pure Virgin Kraft Liner and 520.613 metric tonnes of Semi-Chemical Fluting was shipped on board the vessel "SANG JIN" and for which Ocean Bills of Lading were issued by Grundvig Chartering Inc, as Agents for the Master, showing Dar-Es-Salaam as the discharge port. I understand Grundvig to have been the Sub-Time Charterers of the "SANG JIN" at the material time.

6. In relation to the importation into Zambia of these consignments the necessary government approval had been obtained and import licenses issued. Payment in foreign currency to Plenum under the Bills of Exchange at 120 days had been approved by the Bank of Zambia within the terms of the Exchange Control Act.

7. In early August of this year my company learned that for reasons which are still not clear to me the "SANG JIN" had deviated to Pensacola, Florida and there discharged

the consignments to which I have referred into warehouses. I am advised by my English solicitors that the carriers were thereby clearly in breach of the contract of carriage evidenced by the Bills of Lading.

8. In accordance with my company's instructions the "SANG JIN" was subsequently arrested at Galveston and the proceedings herein commenced against the various Defendants.

9. I am now advised that this Honourable Court has ordered not only that security in the sum of US $1.475 million be provided to the Plaintiffs, which security I understand now to have been provided althouth I have not seen the relevant documentation, and further that security for a like amount be provided by cargo to the Defendants in respect of their purported Counterclaim which was originally put forward in the sum of US $2.96 million.

10. I am bound to say that I am considerably surprised that as an innocent party my company, as co-Plaintiff with Somali cargo interests, should be ordered to provide security to the Defendants who, in my respectful submission, are wholly responsible for the events which have taken place and to which these proceedings refer. As a result of the deviation of the "SANG JIN" to Pensacola and the discharge there of my company's cargo, Monterey have a prima facie claim in respect of which, and for the purposes of obtaining security, the Vessel was arrested.

11. Notwithstanding my expressed surprise, which is supported by the legal advice which my company has obtained, the principal purpose of swearing this my Affidavit is respectfully to make it clear to this Honourable Court that it is simply not possible for may company to provide security, or indeed any part thereof, which has been ordered in favour of the Defendants. The reasons for that inability result from the severe restrictions on the use of

limited foreign exchange resources to which I have referred above. My company has, nevertheless, made application to the Bank of Zambia in order to endeavour to obtain the necessary allocation of foreign exchange which would enable security to be provided; at the time such application was made the sum of US $2.96 million, being the quantum of the Defendants' notified Counterclaim, was requested. That request has been firmly rejected as evidence of which there is not produced and shown to me a true copy of a telex dated 13th October 1982 from the Bank of Zambia which is Exhibit "MGP 1" hereto. Throughout the period concerned I have maintained close and regular touch with those concerned at the Bank of Zambia and it has been made quite clear to me, although this is not clear from the telex which is Exhibit "MGP 1" hereto, that even if a lesser sum had been requested this too would have been refused. In short, the Bank of Zambia, as custodian of the country's foreign exchange resources, is not prepared to allocate any of such scarce resources for the purpose requested.

12. I well appreciate that so far as concerns the Defendants they may well take the view and say that it is for these very reasons that they require security. In my respectful submission this Honourable Court should have regard to the circumstances as I have truthfully described them to be. I further respectfully submit that the Plaintiffs should be entitled to retain the benefit of the security which has now been provided to them without being required themselves to provide any security for the purported and, I suggest, questionable claims of the Defendants. In view of the circumstances in which my company now finds itself, following discharge of its cargo at Pensacola and the need to effect reshipment at considerable expense, it would be wholly wrong that the Plaintiffs should be denied the benefit of their security for reasons solely that they are unable to provide any security themselves.

13. Accordingly, I respectfully request that this Honourable Court reconsider the Order made against the Plaintiffs for the provision of security in the sum of US $1.475 million and that such Order now be removed but that at that same time the Plaintiffs be entitled to retain the benefit of the security they have themselves received in that amount.

SWORN at ICI Salisbury House
London Wall, London ECZ
England, this 14th day of
October 1982

Before me,

A Notary Public
My Commission expires with life

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: United Kingdom of Great Britain and Northern Ireland
   Pays: Royaume Uni de Grande Bretagne et d'Irlande du Nord

   This public document/Le present acte public

2. has been signed by /s/ R. C. Rosser
   a ete signe par

3. acting in the capacity of Notary Public
   agissant en qualite de

4. bears the seal/stamp of the said Notary Public
   est revetu du sceau/timbre de

5. at London/a Londres

Certified/Atteste

6. the/le 15th October 1982

7. by the Foreign and Commonwealth Office/par le Ministere des Affaires et du Commonwealth

8. Number/sous No. D080121

9. Stamp: timbre: [SEAL]

10. Signature: /s/ A. R. Hubbard
    For the Secretary of State for Foreign and Commonwealth Affairs
    Pour le Secretair d'Etat aux Affaires Etrangeres et du Commonwealth

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. No. H-82-2573

INCAS AND MONTEREY PRINTING
AND PACKAGING LTD.
Plaintiffs,

v.

M.V. SANG JIN, her engines, tackle, apparel etc., *in rem* and JOONG ANG SHIPPING CO., her owners and/or operators, VAN WEELDE BROTHERS SHIPPING LIMITED, her owner pro hac vice and/or charterer and/or operator, and GRUNDVIG CHARTERING INC., her charterer and/or subcharterers and/or operator, *in personam*,
Defendants.

AFFIDAVIT OF MICHAEL GORDON PURSLOW

Norton, Rose, Botterell & Roche
Kempson House,
Camomile Street,
London EC3A 7AN

Telephone 01-283 2434
Reference NPE/14/C124705

English Solicitors for Monterey
Printing & Packaging Limited.

IN THE UNITED STATES DISTRICT COURT
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Defendants.

This is the Exhibit marked "MGP 1" referred to in the Affidavit of Michael Gordon Purslow dated the 14th day of October 1982

Before me,

A Public Notary.

"M.G.P.I."

12.09
MONTY ZA34380

ZBANK ZA41560

MONTY ZA34380
M G PURSLOW
MANAGING DIRECTOR
MONTEREY PRINTING AND PACKAGING
13/10/82

TELEX NO MONTY ZA 34380

REFERENCE MADE YOUR TELEX WHEREIN YOU SEEK APPROVAL FROM BANK OF ZAMBIA TO PROVIDE US DOLLARS 2.96 MILLION AS SECURITY IN CLAIM FOR CARGO WHICH WAS OFFLOADED IN U S A STOP

DUE TO CURRENT FOREX CONSTRAINTS IT IS NOT POSSIBLE FOR BANK OF ZAMBIA TO PUT UP THIS AMOUNT AS FOREX STOP CONSEQUENTLY APPROVAL HAS BEEN DECLINED STOP REGARDS

T D MULONGA
DIRECTOR EXCHANGE CONTROL
BANK OF ZAMBIA LUSAKA

COL US DOLLARS 2, EEE 2.96 MILLION CKD
PM
ZBANK ZA41560
MONTY ZA34380

INCAS

ARAARA-JAMAAMA-JUBBADA HOOSE (SOMALIA)

SL_____
N.Prot Wek/179/82

UJEEDDO

AFFIDAVIT

TO WHOM IT MAY CONCERN

I, THE UNDER-SIGNED, ADAN ABDI HUSSEIN, PRESIDENT OF I.N.CA.S. S.p.A. DECLARE THAT OUR COMPANY HAS ALL ITS PROPERTY IN SOMALIA AND IS NOT IN A POSITION TO DEPOSIT BOND OR CASH AGAINST THE COUNTER-CLAIM OF VAN WEELDE.

Adan Abdi Hussein
President
I.N.CA.S.

SOMALI DEMOCRATIC REPUBLIC
MINISTRY OF FOREIGN AFFAIRS

This is to certify that the above is the true signature of
Adan Abdi Hussein
President
I.N.C.A.S.

MOHAMED HASSAN SAID
DIRECTOR OF LEGAL DEPARTMENT WAD/WSH/7420

Somali Democratic Republic
Region of Benadir
City of Mogadishu
American Embassy

I, John Francis Keefe, Jr., Consul of the United States of America at Mogadishu, duly commissioned and qualified, do hereby certify that Dr. Mohamed Hassan Said, whose true signature and official seal are respectively affixed to the annexed document, was on the 7th day of October, 1982, the date thereof, the Director of the Legal Department of the Somali Ministry of Foreign Affairs, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and official seal this 7th Day of October, 1982.

/s/ JOHN FRANCIS KEEFE, JR.
Consul Of The United States of America